# INDEX.

## ACTION.


1. SPLITTING DEMAND: TRUSTEE OF EXPRESS TRUST. One who holds a demand partly in his own right and partly in the right and for the benefit of another, is as to the other a trustee of an express trust, and cannot, by assigning his own interest, split up the cause of action, and thus deprive his *cestui que trust* of the right to have him enforce his rights by suit. *Richardson v. Laclede County*, 68.

2. ACTION BY THIRD PARTY ON CONTRACT MADE FOR HIS BENEFIT. Where a debtor abandons his contract and the owner, being indebted to the contractor for work done, pays the laborers, deducting what they owe A., then pays A., deducting what he owes B., all parties thus paid acceding to the arrangement, there is an implied undertaking on the part of the owner to pay B. the amounts thus retained, and B. has a right of action therefor upon the implied promise thus made for his benefit. *Gibson v. The St. Louis, Kansas City & Northern Railway Company*, 549.


## ADMINISTRATION.


1. ADMINISTRATOR, APPEAL BY. An administrator may maintain an appeal from an order of payment on the ground that it lays down a rule of apportionment which works injustice as between the creditors of the estate. *In the Matter of the Estate of McCune*, 200.

2. ADMINISTRATION: APPORTIONMENT OF ASSETS: INTEREST: SECURED CREDITORS. The assets of an insolvent decedent's estate are to be apportioned among the creditors in proportion to the amounts due them severally at the date of apportionment, and for the purpose of ascertaining these amounts, interest on the several allowances to that date must be taken into account; and if there are secured creditors, any sums which they may have realized on their securities since obtaining their allowances must be deducted. *Ib.*

3. EXHIBITION OF DEMANDS. The serving of process in a suit against an administrator instituted in a court having no jurisdiction, cannot be regarded as valid notice to the administrator of the exhibition of the demand sued on. *Wernse v. McPike*, 249.

4. JURISDICTION IN PROBATE CASES. The act of March 19th, 1866, establishing probate courts in Ralls and certain other counties invested them with exclusive jurisdiction of suits against the estates of deceased persons, commenced after their death; and the fact that a living person was jointly liable with a decedent did not authorize the circuit court to take jurisdiction. *Ib.*

5. ——— : NOTICE OF DEMAND. Without notice to the administrator, a void judgment against an estate was presented to the probate court and was by that court assigned to the fifth class of allowed demands. *Held*, that this did not constitute a valid allowance of the claim, and the administrator properly disregarded it in making distribution. *Ib.*

6. CANCELLING UNLAWFUL ADMINISTRATION. It is an inherent power in every judicial tribunal to correct an error which it may have committed, when no positive rule of law forbids. Hence, where it was made to appear to the probate court that a pending administration was without authority of law, *Held*, that it was the duty of that court to revoke the authority claimed by the administrator and to stay further proceedings, though there was no express statutory provision authorizing such action. *McCabe v. Lewis*, 296.

7. THE PUBLIC ADMINISTRATOR. While the public administrator may in the first instance act on his own judgment in taking charge of an estate, his determination is not conclusive of his authority to do so. The final determination of the question lies with the probate court. *Ib.*

8. ———. The fourth, fifth and sixth subdivisions of section 8 of the chapter on Public Administrators authorizes that officer to take charge only of property which was in his county at the time of the death of the deceased. Wag. Stat., p. 122. *Ib.*

9. ———. An administratrix in Louisiana made final settlement of the estate there and then moved to Missouri. The public administrator here alleging that she had fraudulently converted to her own use a part of the assets of the deceased and had brought them into Missouri, took charge of the estate for the purpose of recovering them. *Held*, that if the allegations were correct the public administrator was not entitled to administer. Her liability was to the creditors and distributees directly. *Ib.*

10. A PUBLIC ADMINISTRATOR who has unlawfully taken charge of an estate cannot maintain an action to recover assets of the estate. *Lewis v. McCabe*, 307.

11. A BOND IS NOT INVALID as a statutory bond merely because it does not follow the exact words of the statute. *Newton v. Cox*, 352.

12. THE OBJECTION THAT A DEMAND was not made on the executor before the issuance of execution against him, cannot be made in a proceeding on a *scire facias* against his sureties. *Ib.*

13. VOID ADMINISTRATOR'S DEED: EQUITIES OF GRANTEE FOR RE-IMBURSEMENT. If an administrator's deed fails to pass title by reason of a defect in the proceedings on which it is founded, the heirs of the intestate will still not be permitted to recover the land without reimbursing the purchaser for the purchase money and any taxes paid by him with interest on both. *Schafer v. Causey*, 365.

14. ADMINISTRATION: REMEDY AGAINST SURETIES OF DECEASED ADMINISTRATOR. The remedy provided by section 68, page 487, General Statutes 1865, against the sureties of a deceased administrator or executor who has not accounted for funds of the estate, may be invoked in any case of administration. It is not solely applicable to partnership estates. *Babb v. Ellis*, 459.

15. DUAL FIDUCIARY CAPACITY: ADMINISTRATOR: COMMISSIONER IN PARTITION: LIABILITY FOR FUNDS. Where the administrator of an estate was appointed commissioner in partition to sell lands of the estate, and upon making sale was ordered to pay a certain portion of the proceeds to the widow in lieu of homestead and dower, and the remainder, after satisfying certain demands, to himself as administrator, and the widow, without giving a supersedeas bond, appealed from this order, claiming a larger share of the proceeds; *Held*, that as to the part not claimed by her it was not only the right but the duty of the commissioner to transfer it to himself as administrator pending the appeal. *Ib.*

16. ——: ——. The evidence in the present case, *Held*, to show that funds held by deceased as commissioner in partition were transferred by him to himself as administrator. *Ib.*

17. PUBLIC ADMINISTRATOR: PLEADING. A petition in an action by a public administrator against his predecessor in office to recover assets not accounted for, sufficiently shows a right of recovery in the plaintiff, when it avers that the court of probate has ordered defendant to pay and deliver the same to plaintiff, and that defendant, upon demand made, has refused to comply with the order. It is not necessary that it should further aver that the estate has been fully administered, or that defendant has been discharged in the ordinary course of law as other administrators. *The State ex rel. Guenther v. King*, 510.

18. ADMINISTATOR'S DEED. An administrator's deed will pass no title to land not described in the order of sale. *Greene v. Holt*, 677.

19. ——. A deed by an administrator to his co-administrator is void. *Ib.*

PROBATE OF WILLS. See Bradstreet v. Kinsella, 63.

APPEAL FROM ORDER DISCHARGING ADMINISTRATOR. See Ro Bards v. Lamb, 192.

FEES OF PROBATE JUDGE. See Gammon v. Lafayette County, 675.

## ADVERSE POSSESSION.

1. FACTS HELD NOT TO AMOUNT TO. Upon a plea of the statute of limitations, the only evidence given of possession during the first year of the statutory period was that defendant's grantor went once upon the land, set up two stakes at what he was told were corners, tried to ascertain the boundaries, and afterward paid the taxes for the year. *Held*, that this did not amount to possession, and the plea was not sustained. *Bradstreet v. Kinsella*, 63.

2, ACTION FOR REAL ESTATE: GENERAL DENIAL: EVIDENCE. In an action involving title to real estate, the defense of adverse possession for the statutory period is admissible under a general denial of the plaintiff's title. *Hill v. Bailey*, 454.

## AGISTMENT.

LIABILITY OF AGISTER FOR DAMAGES DONE BY CATTLE IN HIS CARE. See Reddick v. Newburn, 423.

## APPEALS.

1. APPEAL AFTER SATISFACTION. A party who has accepted satisfaction of a judgment in his favor, cannot afterward appeal. Thus where a probate order ascertained the balance of assets in the hands of a retiring administrator and declared that on filing in court the receipt of his successors therefor, he should be discharged, and the successors received the assets and gave such a receipt, and he produced the receipt in court, and an order was entered discharging him: *Held*, that they could not appeal from the order. *Ro Bards v. Lamb*, 192.

2. ADMINISTRATOR, APPEAL BY. An administrator may maintain an appeal from an order of payment on the ground that it lays down a rule of apportionment which works injustice as between the creditors of the estate. *In the Matter of the Estate of McCune*, 200.

3. APPEAL: SUPERSEDEAS. An appeal, with the statutory bond, from a judgment awarding a peremptory *mandamus*, operates as a *supersedeas*. *The State ex rel. The Laclede Bank v. Lewis*, 370.

## ARBITRATION.

AN award by an arbitrator upon the testimony of unsworn witnesses, is not binding. *Wolfe v. Hyatt*, 156.

## ARREST.

POWER TO MAKE, WITHOUT WARRANT. See The State v. Grant, 236.

## ATTORNEY AND CLIENT.

MARRIED WOMAN'S CONTRACT TO PAY ATTORNEY'S FEES. See Musick v. Dodson, 624.

## BAILMENT.

1. AGISTER OF CATTLE: LIABILITY FOR DAMAGES DONE BY THEM—AT COMMON LAW—UNDER THE STATUTE. It is a rule of the common law that an agister of cattle is liable for damages done by the cattle escaping from his own premises upon those of another; and this rule is not changed by section 5653, Revised Statutes, which makes the owner liable for damages where his cattle break into any inclosure having a lawful fence. *Reddick v. Newburn*, 423.

2. LANDLORD'S LIEN FOR RENT: CHATTEL MORTGAGE: CONFLICTING RIGHTS UNDER THEM. A tenant covenanted that his landlord should have a lien on the furniture which the tenant should put into the leased premises, and afterward gave a deed of trust on the same furniture, to secure notes for money loaned. The landlord subsequently entered for non-payment of rent, took possession of the furniture, used it for a time and then sold it for less than the rent in arrear. The notes were due at the time of the entry. In an action by the holder of the notes against the landlord to recover for the use of the furniture; *Held*, that the relation of the landlord to the furniture was rather that of a pledgee than a mortgagee, and while he might retain the possession he could not use it without accounting to the plaintiff for the value of the use.

But per HENRY, J.: He was entitled to retain enough to make good the deficiency of rent, and was accountable to the plaintiff only for the balance. *The State ex rel. Wright v. Adams*, 605.

BAILEE MAY RECOVER FOR DAMAGES TO CATTLE. See Alexander v. Hannibal & St. Joseph Railroad Company, 494.

## BAWDY HOUSE.

INDICTMENT FOR KEEPING. The State v. Bregard, 322.

## BILL OF EXCEPTIONS.

WHERE it appeared that by an agreement of record the appellant was allowed thirty days after the adjournment of court within which to file a bill of exceptions, but nothing in the bill or the record proper showed when the bill was filed or when the court adjourned, or even with certainty that the bill was ever filed at all; *Held*, that this court could not consider it. *The Eau Claire Lumber Company v. Howard*, 517.

## BOARDING HOUSE.

LICENSE TO KEEP. See The City of St. Louis v. Bircher, 431.

## BURGLARY.

1. BURGLARY AND LARCENY: AUTREFOIS CONVICT. Burglary and larceny, committed at the same time, are distinct offenses. A conviction of one is not a bar to a prosecution for the other. *The State v. Martin*, 337.

2. BURGLARY AND LARCENY COMMITTED TOGETHER. Although the statute permits the offenses of burglary and larceny, when committed together, to be charged in one count, they nevertheless remain distinct offenses, and the jury is not bound to find the defendant guilty of one because he is guilty of the other. *The State v. Kelsoe*, 505.

## CARRIERS.

1. CARRIER OF PASSENGERS—NOT AN INSURER. A carrier of passengers is not an insurer but is held only to the utmost care and diligence of a cautious person. An instruction, therefore, that a carrier was liable for an injury to a passenger from a defect in his vehicle unless he had used the "greatest possible care and diligence that was necessary," is erroneous. *Gilson v. The Jackson County Horse Railway Company*, 282.

2. CARRIER OF LIVE STOCK: SPECIAL CONTRACT. The liability of carriers of live stock may be limited by a special contract, whereby the shipper agrees that his claim for damages under the contract, if any, shall be made in writing to the general freight agent of the carrier within five days after the live stock shall have been unloaded or delivered at the point of destination. *Dawson v. The St. Louis, Kansas City & Northern Railway Company*, 514.

## CITIZEN.

See The State v. France, 681.

## COLLATERAL SECURITY.

HOW TREATED, IN APPORTIONING ESTATE OF A DECEDENT. See In the Matter of McCune's Estate, 200.

## COMPROMISE.

ADMISSIONS, AS EVIDENCE: COMPROMISE. Admissions made by a party to a controversy to a third person under the impression that he is the representative of the adverse party and is endeavoring to effect a compromise of the controversy, are not admissible in evidence against the party making them, though the impression be an erroneous one. *The Kansas City, St. Louis & Chicago Railroad Company v. Farrell*, 183.

## CONGRESSIONAL ELECTION.

See The State ex rel. Broadhead v. Berg, 136.

## CONSIDERATION.

DISMISSAL OF SUIT, A SUFFICIENT. See Jasper County v. Tavis, 13.

PART PAYMENT AFTER MATURITY, NONE. See Petty v. Douglass, 70.

FAILURE OF. See Compton v. Parsons, 455.

MARRIED WOMAN'S CONTRACT. See Musick v. Dodson, 624.

## CONSTITUTIONAL LAW.

TITLE OF ACT: DISTURBING THE PEACE. The act of 1868 in relation to disturbances of the peace made it an offense to disturb the peace of "any neighborhood, or of any family, or of any school assembled for the purpose of instruction." Acts 1868, p. 3. An amendatory act passed in 1870 entitled "An act to change the penalty for disturbances of the peace," not only changed the penalty, but made the offense to consist in the disturbing of the peace of "any *person* or neighborhood, or of any family, or of any school assembled for the purpose of instruction." Acts 1870, p. 46. *Held*, that in so far as the latter act undertook to make it an offense to disturb the peace of any *person* it was unconstitutional, that matter not being expressed in the title. *The State v. Persinger*, 346.

"DUE PROCESS OF LAW." See The City of St. Louis v. Richeson, 470.

## CONTEMPT.

POWER OF NOTARY TO COMMIT FOR. See Ex Parte Priest, 229.

## CONTINUANCE.

See The State v. Cavanaugh, 53; See The State v. Andrew, 101; See The State v. Underwood, 630.

## CONTRACTS.

1. ACTION BY THIRD PARTY ON CONTRACT MADE FOR HIS BENEFIT. Where a debtor abandons his contract and the owner, being indebted to the contractor for work done, pays the laborers, deducting what they owe A., then pays A., deducting what he owes B., all parties thus paid acceding to the arrangement, there is an implied undertaking on the part of the owner to pay B. the amounts thus retained,

and B. has a right of action therefor upon the implied promise thus made for his benefit. *Gibson v. The St. Louis, Kansas City & Northern Railway Company*, 549.

2. CONTRACT OF FATHER TO SURRENDER HIS MINOR CHILD. By the common law, a father cannot irrevocably divest himself of his right and duty to have the custody and charge of his child. They spring from the law of nature; and public policy, for the good of society, will not permit him to abandon them. *In the Matter of Berenice S. Scarritt*, 535.

MARRIED WOMAN'S CONTRACT TO PAY ATTORNEY'S FEES. See Musick v. Dodson, 624.

## CONVERSION.

SALE ON TRIAL: VENDOR'S REMEDIES ON CONTRACT. Plaintiff sold defendant a machine with warranty, to be paid for if upon trial it proved to be as warranted. After trying it, defendant declined to take it and so notified plaintiff, but continued to use it for some days. He then offered to return it to plaintiff, but plaintiff refused to receive it, and thereupon defendant left it on the sidewalk in front of plaintiff's store-room. *Held*, that these facts would not sustain an action for conversion. If the machine was really what it was warranted to be, plaintiff's remedy was by action on the contract for the purchase-price; if not he could still have recovered for the use of the machine after defendant gave notice that he would not take it. *McCormack v. Gilliland*, 655.

## CORPORATIONS.

1. EXECUTION AGAINST STOCKHOLDER: WHEN LIABILITY BECOMES FIXED. Section 13, Wagner's Statutes, page 291, provides as follows: "If any execution shall have been issued against the property or effects of a corporation, and if there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; provided, always, that no execution shall issue against any stockholder except upon an order from the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the person sought to be charged; and upon such motion, such court may order execution to issue accordingly." *Held*, that the liability of the stockholder is measured by the number of shares held by him at the return of the execution, and not by the number which he held when the motion was filed. *Skrainka v. Allen*, 384.

2. UNPAID STOCK: LIABILITY TO CREDITORS: MORTGAGE BONDS. "Where persons become stockholders of a corporation with the understanding that calls are not to exceed a certain per cent, and afterward calls are made in excess of that amount, to compensate for which second mortgage bonds are issued to these stockholders, they are

liable to the creditors of the corporation for unpaid stock to the amount realized by the sale of the bonds." This ruling in *Skrainka v. Allen*, 7 Mo. App. 434, affirmed. *Ib.*

3. SALE OF BANK STOCK: REPRESENTATIONS BY BANK OFFICER AS TO CONDITION OF THE BANK. A person buying stock of a bank from the bank is entitled to rely upon assurances of an officer of the bank as to its financial condition; and if already a stockholder is not bound to avail himself of his right of examining the books of the bank. *The Union National Bank v. Hunt*, 439.

4. ——: ——. A representation by a bank officer that stock of his bank is worth $100 per share is a mere expression of opinion or commendation of the stock, and if it turns out to be false a note taken by him for the price of the stock will not thereby be avoided though it was relied on by the purchaser, but it is otherwise with a representation that the bank is in a solvent condition and doing a good business. *Ib.*

5. NATIONAL BANKS: POWER TO SELL THEIR OWN STOCK. When a National bank purchases its own stock to protect itself from loss upon a debt, it is bound to sell the stock within six months, and may sell on credit and take the purchaser's note, with the stock sold as collateral to secure it, provided this is done in good faith. *Ib.*

6. ULTRA VIRES AS A DEFENSE. An abuse of the corporate powers is not a sufficient defense to such a note. The question of misuser will not be decided collaterally by setting aside a sale otherwise good. *Ib*

7. DEED TO JOINT STOCK COMPANY: SUBSEQUENT CORPORATION. A conveyance was made to A. B. & C., "directors of the St. Louis & Birmingham Iron Mining Company, and their successors in office, in special trust for the use of the shareholders in said company," which was a joint stock company. Subsequently the members of this company were created a corporation under the name of the St. Louis & Birmingham Iron Mining Company. *Held*, that in the absence of any conveyance from A. B. & C., or from the shareholders in the joint stock company, the corporation never acquired title to the land held by the joint stock company under the foregoing deed. *Frank v. Drenkhahn*, 508.

## COSTS.

IN MANDAMUS PROCEEDINGS. The costs of a mandamus proceeding are to be adjudged only against such of the respondents as are found to have refused to do their duty. *The State ex rel. Broadhead v. Berg*, 136.

## COUNTY WARRANTS.

ON INTERNAL IMPROVEMENT FUND. The holder of a county warrant payable out of a fund created alone by the bounty of the governments of the United States and the State, and which the county authorities

have no power either to create or replenish, by taxation or otherwise, (such as the Internal Improvement Fund,) can look only to that fund for payment of his warrant. He has no claim upon the county revenues proper. *Campbell v. Polk County Court*, 57.

COURTS.

SPECIAL JUDGE. Under the act of 1877, (Sess. Acts, p. 357, § 1,) to entitle the defendant in a criminal case to be tried by a special judge, it was necessary that the affidavit of prejudice on the part of the regular judge should be supported by the affidavits of two reputable persons. *The State v. Cavanaugh*, 53.

HAVE INHERENT POWERS TO CORRECT THEIR OWN ERRORS. Lee McCabe v. Lewis, 296.

COVENANTS OF TITLE.

JUSTICES' COURTS: JURISDICTION. A justice of the peace has no jurisdiction of an action for a breach of covenant of warranty of title to real estate. *Bredwell v. The Loan & Investment Company*, 321.

CRIMINAL LAW.

1. FELONIOUS WOUNDING. In a prosecution under section 1264, Revised Statutes 1879, for a felonious wounding, it is not error to instruct the jury that if they believe defendant did *unlawfully* assault and shoot his victim and thereby inflict great bodily harm, they should find defendant guilty. It is not necessary to define the term "unlawfully." *The State v. Munson*, 109.

2. THE RIGHT OF SELF-DEFENSE. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party himself. On the other hand, to justify the killing of an adversary on this ground, it is not necessary that the danger apprehended by defendant should have been real or actually impending. It is only necessary that the defendant should have had reasonable cause to apprehend that there was an immediate design to kill or do him some great bodily harm, and that there should have been reasonable cause to apprehend immediate danger of such design being accomplished. *The State v. Johnson*, 121.

3 CUMULATIVE SENTENCES Where several sentences of imprisonment are passed on the same day, founded upon successive convictions, they should be cumulative. R. S. 1879, § 1659. *Ex Parte Bryan*, 253.

4 BURGLARY AND LARCENY: AUTREFOIS CONVICT. Burglary and larceny, committed at the same time, are distinct offenses. A conviction of one is not a bar to a prosecution for the other. *The State v. Martin*, 337.

6. DEGREE OF CRIME: DISTINCT OFFENSES: STATUTE. Revised Statutes, section 1653, which provides "that if upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence, amount in law to a felony, such person by reason thereof shall not be entitled to be acquitted for such misdemeanor, and no person tried for such misdemeanor shall be liable afterward to be prosecuted for felony on the same facts unless the court shall think fit in its discretion to discharge the jury from giving any verdict upon such trial and to direct such person to be indicted for a felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor," relates only to offenses of which there are several degrees or grades, and not to an independent offense which may be disclosed by the evidence at the trial. *Ib.*

6. INFANTS: DEATH PENALTY. Section 1666, Revised Statutes, exempts persons who commit crime under the age of eighteen years from imprisonment in the penitentiary, but not from the death penalty. *The State v Adams*, 355.

7. THE CRIMINAL CAPACITY OF INFANTS. An infant between the ages of seven and fourteen is presumed to be incapable of committing crime, and the *onus* is on the State to prove his criminal capacity. *Ib.*

8. SELF-DEFENSE: APPARENT DANGER. The acting on a reasonable belief of harm, though unfounded, excuses the defendant. But this principle has no application, and instructions embodying it should not be given, in a case where the hostile demonstration which induced the act was made with a real and not an apparent deadly missile or weapon, the exact nature of which the defendant could see. *The State v. Umfried*, 404.

9. CHARACTER OF PRISONER: WEIGHT OF EVIDENCE. On a trial for murder, the defendant asked an instruction that in a doubtful case where the accused had established a good character the law presumed that he would not commit the offense charged. This was refused, and the jury told that they might take his character into consideration with all the other facts in determining his guilt or innocence. *Held*, correct. *The State v. Underwood*, 630.

10. HOMICIDE: WIFE'S INFIDELITY. To reduce a homicide to manslaughter on the ground of illicit intercourse between the deceased and the wife of the defendant, the detection must have been in the very act, and the killing instant upon the detection. *The State v. France*, 681.

DEFENDENT AS A WITNESS FOR HIMSELF. See The State v. Sanders, 35; The State v. McLaughlin, 320; The State v. McGinnis, 326; The State v. Turner, 350; The State v. Kelsoe, 505.

## CURTESY.

HUSBAND'S CURTESY: WITNESS. Where a married woman, claiming as heir of her deceased father, in conjunction with her husband

sued to set aside a deed executed by the father, on the ground of undue influence and mental incapacity: *Held*, that the husband had no such interest as made him a competent witness in the case. The wife never having been seized of the land conveyed by the deed, he could not be tenant by the curtesy initiate. Distinguishing *Steffen v. Bauer*, 70 Mo. 399. *Wood v. Broadley*, 23.

CUSTOM.

CUSTOM AS AN ELEMENT. As between landlord and tenant, evidence of custom with respect to chattels annexed to the realty, by which they are treated as personalty, is admissible, but not so with respect to articles annexed by a mortgageor or grantor before the execution of his conveyance. *Thomas v. Davis*, 72.

DAMAGES.

1. MEASURE OF DAMAGES. In an action on the promise of defendant to pay a note of a third person, the note is properly admitted in evidence to measure the extent of defendant's liability. *Hale v. Stuart*, 20.

2. DAMAGES VOLUNTARILY INCURRED. A railway company being about to erect a bridge over its road at a road-crossing, the present plaintiff who was interested in the road, objected, and requested that it make instead a grade-crossing. Afterward he changed his mind and when the grade-crossing was half made demanded a bridge, which the company refused to build. In an action against the company; *Held*, that the plaintiff could not recover the additional damage resulting to him in consequence of the company having made a grade-crossing instead of a bridge. *The Kansas City, St. Louis & Chicago Railroad Company v. Farrell*, 183.

3. INJURIES RESULTING IN DEATH: ACTION UNDER STATUTE: "FAILS TO SUE." Under the statute, (R. S., §§ 2121, 2122, 2123,) the action for injuries resulting in death may be brought, 1st, "By the husband or wife of the deceased; or, 2nd, If there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased." M. being killed through the alleged negligence of the defendant, his widow brought an action against defendant, which action she voluntarily dismissed. The minor children after the expiration of six months from the death of their father commenced another action. *Held*, this action would not lie, as the wife had not "failed to sue" within the statute. *McNamara v. Slavens*, 329.

4. MITIGATION OF DAMAGES. In an action to recover exemplary damages for killing plaintiff's cow, the court excluded evidence of a sale of the cow to defendant by plaintiff's wife; *Held*, error; 1st, Because there was evidence that plaintiff ratified the sale; 2nd, Because, if defendant believed he had acquired ownership by purchase from the wife it was a circumstance in mitigation of damages. *Henry v. Hug*, 342.

5. AMENDMENT OF PLEADINGS AFTER JUDGMENT. After a motion for new trial had been overruled, the court permitted the *ad damnum* clause of the petition to be amended to conform to the proof whereby the plaintiff's claim for damages was increased from $100 to $500. *Held*, no error. *McClannahan v. Smith*, 428.

6. LIBEL: PUBLICATION ACTIONABLE PER SE. The publication in a newspaper of a false statement that a person was convicted and sentenced to prison for libel, is actionable without proof of special damages. *Boogher v. Knapp*, 457.

7. SALE ON TRIAL: VENDOR'S REMEDIES ON CONTRACT. Plaintiff sold defendant a machine with warranty, to be paid for if upon trial it proved to be as warranted. After trying it, defendant declined to take it and so notified plaintiff, but continued to use it for some days. He then offered to return it to plaintiff, but plaintiff refused to receive it, and thereupon defendant left it on the sidewalk in front of plaintiff's store-room. *Held*, that these facts would not sustain an action for conversion. If the machine was really what it was warranted to be, plaintiff's remedy was by action on the contract for the purchase-price; if not he could still have recovered for the use of the machine after defendant gave notice that he would not take it. *McCormack v. Gilliland*, 655.

DAMAGES FOR OBSTRUCTING A ROAD. See Kansas City, St. Louis & Chicago Railroad Company v. Farrell, 183.

—— FOR FAILURE TO PROSECUTE. See Estey v. Post, 411.

REMITTITUR OF DAMAGES. See Sharpe v. Johnston, 660.

## DEEDS.

RECITALS IN DEED: ESTOPPEL. A grantee is not estopped by a recital in his deed from showing the real consideration upon which it was executed. *Wood v. Broadley*, 23.

TAX DEEDS. See Dunlap v. Henry, 106; Ewart v. Davis, 129; Raley v. Guinn, 263.

SHERIFF'S DEED. See Davis v. Kline, 310.

GUARDIAN'S DEED. See Exendine v. Morris, 416.

## DEEDS OF TRUST AND MORTGAGES.

FIXTURES AS BETWEEN MORTGAGEOR AND MORTGAGEE. See Thomas v. Davis, 72.

TO SECURE RENT. See The State ex rel. Wright v. Adams, 605.

## DEPOSITIONS.

1. NOTARY PUBLIC: POWER TO COMMIT FOR CONTEMPT. The statutes confer authority on notaries public to commit to prison any witness who refuses, when duly summoned, to give his deposition. R. S. 1879, §§ 2133, 2150, 4027. *Ex Parte Priest*, 229

2. DEPOSITIONS. A witness had given his deposition in a former suit, and under stipulation of counsel the parties to another suit growing out of the same facts were at liberty to read it in evidence. *Held*, that this did not excuse him from deposing in the second suit. Neither did the fact that he had been examined at the trial of the former suit and his examination had been written out at length and preserved, and the substance of the examination embodied in a bill of exceptions filed in court. *Ib.*

3. ———: PARTY TO SUIT. A party to a suit is under the same obligation to give his deposition as any other person. *Ib.*

4. ———. That a witness resides within the jurisdiction of the court in which a suit is pending, is in good health and contemplates no prolonged absence, but expects to be present at the trial, is not made by the statute an exception to the right of a party to the suit to have his deposition. *Ib.*

## DITCHES.

RAILROAD DITCHES. See Ellet v. St. Louis, Kansas City & Northern Railway Company, 518; Field v. Chicago, Rock Island & Pacific Railway Company, 614.

## DIVORCE.

MARRIED WOMAN'S PROMISE TO PAY ATTORNEY FOR OBTAINING See Musick v. Dodson, 624.

## DOLLAR MARK.

ITS OMISSION. See Raley v. Guinn, 262.

## EJECTMENS.

1. EJECTMENT: PROPER JUDGMENT IN. Where the defendant in eject ment was in possession under a contract of purchase from the plaintiff, with which he had wholly failed to comply; but he had made valuable improvements upon the land; *Held*, that a judgment requiring him to pay the amount ascertained to be due and directing that a writ of possession issue against him in default of such payment, was erroneous. It should have directed a sale of the premises upon such default. *Jasper County v. Tavis*, 13.

2. PLAINTIFF in ejectment cannot recover unless the legal title was vested in him at the time of bringing the suit. *Dunlap v. Henry*, 106.

3. RAILROADS: ACQUIESCENCE OF LAND-OWNER IN OCCUPATION OF HIS LAND. It is well settled law in this State that if the owner of land encourages or permits a railroad company to enter and construct its road upon his land, he cannot afterward maintain ejectment for the part so taken for a road-bed, either against the company or against a purchaser from the company. *Kanaga v. The St. Lovis, Lawrence & Western Railroad Company*, 207.

4. ALLOWANCE TO DEFENDANT FOR IMPROVEMENTS. If a defendant in ejectment claiming under a stranger to the plaintiff's title, fails in his defense, he can obtain the value of any improvements he has made only in the manner provided by the statute, (R. S. 1879, §§ 2259, 2260, 2261,) *i. e.*, by petition after final judgment for possession. A clause in that judgment, ascertaining the value of the improvements and requiring plaintiff, within a time limited, to pay them, and in default of payment directing a special execution against the land to issue therefor, is unauthorized. *Henderson v. Langley*, 226.

5. DEFENDANT'S CLAIM FOR IMPROVEMENTS. The only way for a defendant in ejectment to obtain the value of his improvements made by him in good faith, is to proceed under section 2259 and 2260, Revised Statutes, after judgment against him for possession. *McClannahan v. Smith*, 428.

6. ACTION FOR REAL ESTATE: GENERAL DENIAL: EVIDENCE. In an action involving title to real estate, the defense of adverse possession for the statutory period is admissible under a general denial of the plaintiff's title. *Hill v. Bailey*, 454.

## ELECTIONS.

1. MANDAMUS TO COMPEL BOARD OF CANVASSERS TO COUNT RETURNS. Where it appeared that a board of canvassers of election returns had completed the canvass and made out an abstract of the votes before the expiration of the time limited by law for the performance of these duties, but the abstract was still in the custody of a member of the board when notice was given them of an alternative writ of mandamus sued out within that time, requiring them to count certain votes which they had illegally rejected; *Held*, that the writ was properly issued and should be made peremptory, and this though it might have been true that the board had finally adjourned when the notice was served. *The State ex rel. Broadhead v. Berg*, 136.

2. ELECTION RETURNS: DESIGNATION OF OFFICE: "FOR CONGRESS." Election returns designated the office for which rival candidates received votes thus: "For Congress." Upon objection made that this was not the proper designation of any office; *Held*, that it could by no reasonable intendment have reference to any other office than that of Representative in Congress and should be so construed. *Ib.*

3. SURPLUSAGE IN RETURNS. Election returns otherwise proper will not be invalidated by reason of the fact that they include something to which the returning officers are not by law required to certify. Hence, where judges of election were not by law required, in certifying the votes received by the several candidates for representative in congress, to designate the congressional district by number, or otherwise. *Held*, that certificates of an election in the Ninth Congressional district which in addition to everything else required by the statute to be certified contained the following "For Congress," were not void, and should be canvassed and counted for the Ninth District. *Ib.*

4. CONGRESSIONAL ELECTION IN ST. LOUIS: REGISTER'S ABSTRACT OF VOTES. Under the present apportionment act, (Acts 1882, p. 1,) the wards of the city of St. Louis being integral parts of the congressional districts in the city, it is the duty of the city register to make out the abstract of votes for representative in congress in such a manner as to show the number cast in each ward. *Ib.*

5. ——: ——. On the 7th of November, 1882, a general election was held, at which a member of congress was to be elected from the Ninth Congressional District in the city of St. Louis, as the said district is constituted under the apportionment act of 1882. On the same day a special election was held in the Second Congressional District in said city, as said district was constituted under the former apportionment act, (that of 1877,) for the purpose of filling a vacancy. The two districts embraced nearly, though not entirely, the same territory. Both embraced election precincts 155 and 189. The officers of election in those precincts, to distinguish the votes cast at the special election, prefixed to their return of them, these words: "For Congress Second District—Short Term." *Held* that this was proper, and the city register in making out the abstract for the Secretary of State should do the same. *Ib.*

6. ——. The court intimates, though it does not decide, that notwithstanding the change in the congressional districts of the State, by the apportionment act of May, 1882, the order of the Governor for a special election to fill a vacancy to take place November 7th, 1882, in the Second Congressional District, as the same was created and defined by the apportionment act of 1877, was valid. *Ib.*

ELECTIVE OFFICERS: THEIR PAY. See Quinette v. The City of St. Louis, 402.

## EMINENT DOMAIN.

WORK DONE UNDER VOID CONDEMNATION PROCEEDINGS. The law is well settled that if a building be erected upon land without the assent and agreement of the owner of the land, it becomes at once a part of the realty, and is the property of the owner of the freehold. Hence, where a railroad company, having obtained a decree for the condemnation of a tract of land, without the knowledge of the owner erected upon it a building of a permanent character for a depot, and afterward the decree was adjudged to be void; *Held*, that the building had become a part of the realty, and could not be removed by the company, and it made no difference tha it was set upon posts and could be taken away without injury to the ground. *Hunt v. The Missouri Pacific Railway Company*, 115.

## EQUITY

1. PURCHASER OF EQUITABLE TITLE TO LAND. The purchaser of an equitable title to land takes it subject to all the equities between his vendor and the holder of the legal title as they exist at the time of his purchase. Thus, where a county sold swamp land on credit, and caused a certificate of purchase to be delivered to the purchaser specifying the terms of the sale, and providing that on compliance with these terms the purchaser should be entitled to a deed, and by a subsequent contract these terms were altered, but no change was made in the certificate; *Held*, that a subsequent purchaser from the county's vendee was bound by the altered terms. *Jasper County v. Tavis*, 13.

2. EJECTMENT: PROPER JUDGMENT IN. Where the defendant in ejectment was in possession under a contract of purchase from the plaintiff, with which he had wholly failed to comply; but he had made valuable improvements upon the land; *Held*, that a judgment requiring him to pay the amount ascertained to be due and directing that a writ of possession issue against him in default of such payment, was erroneous. It should have directed a sale of the premises upon such default. *Ib.*

3. MARRIED WOMAN'S CONTRACT FOR REAL ESTATE: SUBSEQUENT PURCHASER WITH NOTICE. A vendor who has contracted in writing to convey land to a married woman, and has received part of the purchase money, is so far bound that he cannot rescind without tendering back the money; and one purchasing from him with notice of the contract will take subject to her equitable right, so that if the vendor afterward conveys to her, she may maintain an action against him for the title. *Neef v. Redmon*, 195.

4. VOID ADMINISTRATOR'S DEED: EQUITIES OF GRANTEE FOR RE-IMBURSEMENT. If an administrator's deed fails to pass title by reason of a defect in the proceedings on which it is founded, the heirs of the intestate will still not be permitted to recover the land without reimbursing the purchaser for the purchase money and any taxes paid by him with interest on both. *Schafer v. Causey*, 365.

5. EQUITY PLEADING: MULTIFARIOUSNESS. A bill against several defendants to set aside several distinct conveyances made to them separately on the ground of fraud—one general right being claimed—is not multifarious. *Bobb v. Bobb*, 419.

6. ———. When the answer, after admitting the plaintiff's *prima facie* case, sets up a purely equitable defense, this converts the case wholly into an equitable proceeding. *Hodges v. Black*, 537.

7. THE adjustment of partnership accounts is a matter of equitable jurisdiction. *Ib.*

FOLLOWING TRUST FUNDS. See Mills v. Post, 426.

JUDGMENT NUNC PRO TUNC, INEFFECTUAL AS AGAINST INNOCENT PURCHASERS. See McClannahan v. Smith, 428.

## ESTOPPEL.

1. RECITALS IN DEED: ESTOPPEL. A grantee is not estopped by a recital in his deed from showing the real consideration upon which it was executed. *Wood v. Broadley*, 23.

2. ESTOPPEL Where a municipal corporation enters into a contract within its powers, the doctrine of estoppel applies with the same force as against individuals. *The Union Depot Company v. The City of St. Louis*, 393.

## EVIDENCE.

1. EXAMINATION OF EXPERTS. In the examination of experts, counsel are not always limited to asking for the opinion of the witness upon a stated case. In the present case the court permitted the witness to be asked whether "in his experience as a physician, or in his reading, he had ever met with a case" where such a condition of affairs existed, etc. *Held*, no material error *The State v. White*, 96.

2. OBJECTIONS to evidence must be specific. *The State v. Johnson*, 121.

3. DYING DECLARATIONS. It is the province of the trial court to determine whether declarations offered as dying declarations were made *in articulo mortis*. In the present case certain declarations admitted by the trial court on that footing; *Held*, to have been properly admitted. *Ib.*

4. ADMISSIONS, AS EVIDENCE: COMPROMISE. Admissions made by a party to a controversy to a third person under the impression that he is the representative of the adverse party and is endeavoring to effect a compromise of the controversy, are not admissible in evidence against the party making them, though the impression be an erroneous one. *The Kansas City, St. Louis & Chicago Railroad Company v. Farrell*, 183.

5. IT is error to admit evidence upon a matter not put in issue by the pleadings. *Brooks v. Blackwell*, 309.

6. EVIDENCE OF TESTAMENTARY CAPACITY: PRACTICE. Where non-expert witnesses gave their opinions as to the capacity of a testator to make a will, without objection and without being required to state the ground of their opinions; *Held*, that the fact that they were not shown to have had any correct understanding of the true criterion of testamentary capacity, constituted no objection to a finding and judgment based upon their testimony. *Appleby v. Brock*, 314.

7. ——: NON-EXPERT WITNESSES. The opinions of non-expert witnesses as to testamentary capacity must not be founded upon the testimony of other witnesses, nor upon hearsay or a hypothetical case, but upon their own observation. *Ib.*

8. CRIMINAL LAW: EVIDENCE OF ANOTHER ASSAULT. Where a prisoner charged with assault to kill an officer denied that at the time of the assault he knew of the official character of the person assaulted; *Held*, that for the purpose of contradicting this statement and of showing the aggravated character of the assault, evidence was properly admitted of a difficulty in which defendant was engaged with another person shortly before and which was quelled by the officer. *The State v. Emery*, 348.

9. ——: EVIDENCE OF OTHER OFFENSES. It is error upon a criminal trial to permit the State to give evidence of other and distinct offenses committed upon other persons at other times and places. *The State v. Turner*, 350.

10. HOMICIDE: EVIDENCE OF CONDITIONAL THREATS. On a trial for homicide evidence of conditional threats made by the prisoner is admissible; and it may be no objection that they were made two months before the homicide. *The State v. Adams*, 355.

11. THREATS COMMUNICATED TO DEFENDANT. On a trial for murder evidence of a threat made by the deceased and communicated to the defendant before the killing by a person since dead, is admissible. *The State v. Harris*, 361.

12. WILL: SUIT TO SET ASIDE: EVIDENCE. In a suit to set aside a will executed in 1866, on the ground of undue influence exerted on the testator by his wife, evidence was offered tending to show that prior to their marriage in 1855 she had such influence, but there was no offer to show that it continued down to 1866; *Held*, that it was too remote and was properly rejected. *Ketchum v. Stearns*, 396.

13. RES GESTAE. On a trial for homicide, the defendant offered to show by a witness that a day or two before the homicide the witness had heard defendant say that his son had told him that deceased was angry with him (defendant), and had threatened to mash his brains out, and that defendant requested witness to see deceased and explain the matter and assure deceased that defendant did not want any trouble with him; *Held*, that the evidence constituted no part of the *res gestae*, and was properly excluded. *The State v. Umfried*, 404.

14. EVIDENCE: LIMITING ITS USES. Certain admissions made by persons with whom the defendants in this case were in privity; *Held*, to have been properly admitted in evidence; and although some of them may not have been competent as against all of the defendants, yet as the court was not asked to instruct the jury against which it could be used and against which not, there was no error. *Babb v. Ellis*, 459.

15. OPINIONS AS TO IDENTITY. On a trial for larceny a witness will be allowed to give his opinion, based on his personal knowledge, as to the identity of goods found on the defendant, though he cannot swear positively. *The State v. Babb*, 501.

16. IDENTITY OF NAMES. Identity of names with an *alias* added is sufficient to raise a presumption of identity of persons. *The State v. Kelsoe*, 505.

17. TITLE TO LAND: EVIDENCE. Title to land cannot be established by the mere oral statements of witnesses. *Turner v. Williams*, 617.

18. OBSTRUCTION OF ROADS: EVIDENCE. In an action for the obstruction of a private road defendants offered in evidence a notice served upon them by plaintiff in which the road was stated to be a public road. *Held*, that the notice ought to have been received, as showing that at the time it was given plaintiff esteemed the road a public and not a private road. *Ib.*

19. CHARACTER OF PRISONER: WEIGHT OF EVIDENCE. On a trial for murder, the defendant asked an instruction that in a doubtful case where the accused had established a good character the law presumed that he would not commit the offense charged. This was refused, and the jury told that they might take his character into consideration with all the other facts in determining his guilt or innocence. *Held*, correct. *The State v. Underwood*, 630.

FOREIGN PROBATE. See Bradstreet v. Kinsella, 63.

## EXECUTION.

1. SHERIFF'S DEED: MUST FOLLOW THE EXECUTION. If a sheriff's deed conforms to the execution, in reciting the names of the parties and the dates and amounts of the judgment, it is sufficient in that particular, and if there is a variance between the execution and judgment, and the variance is such as to make the execution erroneous only and not void, the deed will pass the title of the execution debtor. *Davis v. Kline*, 310.

2. ———: VARIANCES AS TO NAMES. Certain variances between the execution and the judgment in respect to the names of parties; *Held*, not to make the execution void. *Ib.*

3. ———: VARIANCES AS TO DATES. Two executions and a sheriff's deed thereon recited judgments of the year 1875, while the judgment rolls showed that they were rendered in 1876. There being other evidence to show that the executions were in fact issued on these judgments; *Held*, that this variance was but a clerical misprision and would not invalidate the execution. *Ib.*

4. "PROCEEDINGS:" "EXECUTION." The term "execution" in section 3713, Revised Statutes, and the term "proceedings" in sections 3717, 3718, are used interchangeably and include a peremptory writ of *mandamus*. *The State ex rel. The Laclede Bank v. Lewis*, 370.

IN BACK TAX CASES. See The State ex rel. Rosenblatt v. Sargeant, 557.

## FALSE PRETENSES.

1. A form of an indictment approved. *The State v. Norton*, 180.

2. IN a prosecution for obtaining money by means of a bogus bond, it is error for the court not to submit to the jury the question whether the act charged was done with intent to cheat and defraud. *Ib.*

3. EVIDENCE. In such a prosecution an experienced officer of police may properly give his opinion as to whether the bond is a genuine or bogus instrument. *Ib.*

## FEES.

1. PUBLIC OFFICERS: THEIR COMPENSATION. The right of a public officer to compensation for his services is derived from the statute. Unless that gives it he must perform his duties without compensation. *Gammon v. Lafayette County*, 675.

2. PROBATE JUDGES: FEES. Probate judges are not entitled to fees for entering orders opening and adjourning court. *Ib.*

## FENCES.

CATTLE BREAKING. See Reddick v. Newburn, 423.

RAILROAD FENCES. See Luckie v. Chicago & Alton Railroad Company, 639.

## FIDUCIARIES.

DUAL FIDUCIARY CAPACITY. See Babb v. Ellis, 459.

## FIXTURES.

1. TEST OF WHAT CONSTITUTES. Whether a chattel becomes a fixture or not, does not depend so much upon the character of the fastening by which it is held down, (whether slight or otherwise,) as upon the nature of the article and its use as connected with the use of the freehold. As between the mortgageor and mortgagee, the true criterion consists in the united application of several tests: 1st, Real or constructive annexation of the article in question to the realty. 2nd, Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected. 3rd, The intention of the party making the annexation, to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the policy of the law in relation thereto, the structure and mode of the annexation and the purpose or use for which the annexation has been made. *Thomas v. Davis*, 72.

2. ——: CUSTOM AS AN ELEMENT. As between landlord and tenant, evidence of custom with respect to chattels annexed to the realty, by which they are treated as personalty, is admissible, but not so with respect to articles annexed by a mortgageor or grantor before the execution of his conveyance. *Ib.*

3. BUILDING ERECTED PENDING CONDEMNATION: EMINENT DOMAIN. The law is well settled that if a building be erected upon land without

the assent and agreement of the owner of the land, it becomes at once a part of the realty, and is the property of the owner of the freehold. Hence, where a railroad company, having obtained a decree for the condemnation of a tract of land, without the knowledge of the owner erected upon it a building of a permanent character for a depot, and afterward the decree was adjudged to be void; *Held*, that the building had become a part of the realty, and could not be removed by the company, and it made no difference that it was set upon posts and could be taken away without injury to the ground. ***Hunt v. The Missouri Pacific Railway Company***, 115.

## FRAUD.

1. FALSE REPRESENTATIONS: SCIENTER. In legal effect a false representation made by a party as of his own knowledge, and not as a mere matter of opinion or general assertion, about a matter of which he has no knowledge whatever, is the same as the statement of a known falsehood, and will constitute a *scienter*. ***Caldwell v. Henry***, 254.

2. ——— OF VENDOR: NEGLIGENCE OF VENDEE. The fact that the vendee omits to examine the property or to make inquiries of persons to whom he is referred by the vendor before buying, will not relieve the latter of liability for false representations made by him concerning it in the course of the negotiation. *Ib.*

3. SALE OF BANK STOCK: REPRESENTATIONS BY BANK OFFICER AS TO CONDITION OF THE BANK. A person buying stock of a bank from the bank is entitled to rely upon assurances of an officer of the bank as to its financial condition; and if already a stockholder is not bound to avail himself of his right of examining the books of the bank. ***The Union National Bank v. Hunt***, 439.

4. ———: ———. A representation by a bank officer that stock of his bank is worth $100 per share is a mere expression of opinion or commendation of the stock, and if it turns out to be false a note taken by him for the price of the stock will not thereby be avoided though it was relied on by the purchaser, but it is otherwise with a representation that the bank is in a solvent condition and doing a good business. *Ib.*

SUIT TO SET ASIDE A DEED FOR. See Chambers v. Rinkel, 538.

## GUARDIAN AND WARD.

1. GUARDIAN, ETC., DEFILING INFANT FEMALE. It is no defense to a charge against a guardian, etc., of carnally knowing a female under the age of eighteen years confided to his care, to show that such carnal knowledge was had with her consent. ***The State v. Willoughby***, 215.

2. STATUTORY SALE: COLLATERAL ATTACK: DEED. A special statute authorized a guardian to sell certain lands of his wards and invest the proceeds—the sale to be approved by the county court. Some of the proceedings of the guardian were informal and irregular, but

the county court approved the sale. *Held*, that its action could not be attacked collaterally. *Held*, further, that the statute prescribing no form of deed to be given to the purchaser, a conveyance was valid, though it was not in the form required by the general law. *Exendine v. Morris*, 416.

## HOTELS.

LICENSE TO KEEP. See The City of St. Louis v. Bircher, 431.

## HUSBAND AND WIFE.

1. A GIFT BY HUSBAND TO WIFE will not be held void because it embraces all the property of the grantor; at least, not unless it is shown to be more than a reasonable provision for her. *Wood v. Broadley*, 23.

2. HUSBAND'S CURTESY: WITNESS. Where a married woman, claiming as heir of her deceased father, in conjunction with her husband sued to set aside a deed executed by the father, on the ground of undue influence and mental incapacity: *Held*, that the husband had no such interest as made him a competent witness in the case. The wife never having been seized of the land conveyed by the deed, he could not be tenant by the curtesy initiate. Distinguishing *Steffen v. Bauer*, 70 Mo. 399. *Ib.*

3. MARRIED WOMAN'S CONTRACT FOR REAL ESTATE: SUBSEQUENT PURCHASER WITH NOTICE. A vendor who has contracted in writing to convey land to a married woman, and has received part of the purchase money, is so far bound that he cannot rescind without tendering back the money; and one purchasing from him with notice of the contract will take subject to her equitable right, so that if the vendor afterward conveys to her, she may maintain an action against him for the title. *Neef v. Redmon*, 195.

4. WIFE'S LAND, PROPER PARTY TO SUIT FOR. During marriage the husband has the exclusive right to his wife's real estate not held to her sole and separate use, and is the only proper party plaintiff in a suit to recover possession thereof; and if he has acted in respect to such real estate in such a manner as to estop him from asserting his right to the possession, neither he nor she can recover, whatever right she or her heirs may have after the dissolution of the marriage by the death of one of the parties or otherwise. *Kanaga v. The St. Louis, Lawrence & Western Railroad Company*, 207.

5. WIFE'S SALE OF HUSBAND'S PERSONALTY: MITIGATION OF DAMAGES. In an action to recover exemplary damages for killing plaintiff's cow, the court excluded evidence of a sale of the cow to defendant by plaintiff's wife; *Held*, error; 1st, Because there was evidence that plaintiff ratified the sale; 2nd, Because, if defendant believed he had acquired ownership by purchase from the wife it was a circumstance in mitigation of damages. *Henry v. Hug*, 342.

6. MARRIED WOMAN'S PROMISE TO PAY ATTORNEY'S FEE FOR DIVORCE. A promise by a married woman to pay an attorney a fee for obtaining for her a divorce from her husband, is not binding on her, and, therefore, not on a subsequent husband; neither is her affirmation of such promise after the divorce has been obtained. *Musick v. Dodson*, 624.

7. MARRIED WOMAN'S PROMISE: AFFIRMATION WHEN DISCOVERT. The moral obligation resting upon a woman to make good her promise given during coverture, is not a sufficient consideration to uphold an affirmation of the promise made after she becomes discovert. *Ib.*

8. ———: ABANDONMENT. The abandonment of a married woman by her husband for a period of time sufficient to entitle her to a divorce, does not remove her disability to contract, unless he has gone beyond the limits of the State. *Ib.*

## IDENTITY.

IDENTITY OF NAMES. Identity of names with an *alias* added is sufficient to raise a presumption of identity of persons. *The State v. Kelsoe*, 505.

ADMISSIBILITY OF OPINIONS AS TO. See The State v. Babb, 501.

## INFANCY.

1. THE DEATH PENALTY. Section 1666, Revised Statutes, exempts persons who commit crime under the age of eighteen years from imprisonment in the penitentiary, but not from the death penalty. *The State v. Adams*, 355.

2. THE CRIMINAL CAPACITY OF INFANTS. An infant between the ages of seven and fourteen is presumed to be incapable of committing crime, and the *onus* is on the State to prove his criminal capacity. *Ib.*

## INJUNCTION.

PRACTICE. In a suit to enjoin a judgment on the ground of surprise, the court, without setting aside the judgment, examined into the merits of the original case, and finding that there was no valid defense, refused the injunction. *Held*, a proper method of procedure. The complainant was not entitled to have the judgment first set aside and his defense then tried by a jury. *Philips v. Samuel*, 657.

## INSTRUCTIONS.

1. AN instruction is properly refused, which ignores a material question in the case although it announces a principle which is correct in the abstract. *The State v. Johnson*, 121.

2. THE court condemns the practice of asking instructions which are but repetitions of each other. *Palmer v. The Missouri Pacific Railway Company*, 217.

3. AN instruction is not erroneous simply because it omits to tell the jury that they must base their finding and belief on the evidence. *The State v. Umfried*, 404.

4. THE court censures the multiplication of instructions as tending to embarrass and confuse the jury. *Coe v. Griggs*, 619.

## INSURANCE.

LIFE INSURANCE: DISSOLVED COMPANIES: NO PRIORITY OF DEATH CLAIMS OVER RUNNING POLICIES. In the absence of any statute to the contrary, claims against a dissolved stock life insurance company founded upon death losses which accrued prior to the date of dissolution are not entitled to priority of payment over claims founded upon policies which were running at that date.

The act of April 21st, 1877, (Sess. Acts 1877, p. 275,) is in harmony with the rule of equality of distribution.

But section 6047, Revised Statutes 1879, establishes a priority in favor of the death claimants.

This section, however, is not operative in the case of a company dissolved before it became a law. To make it operative would be to alter rights fixed by the dissolution. *Relfe v. The Columbia Life Insurance Company*, 594.

## INTEREST.

1. COMPOUND INTEREST. The maker of a note bearing simple interest being sued upon the note, agreed by a separate instrument in writing, in consideration of the dismissal of the suit, that interest thereafter to accrue upon the note if not paid when due, should bear interest. *Held*, that this agreement was founded upon a sufficient consideration and was valid. The fact that it was made after the note was executed and by a separate instrument, was immaterial. R. S. 1855, p. 891, § 6. *Jasper County v. Tavis*, 13.

2 AN open account does not begin to bear interest until payment has been demanded. *Richardson v. Laclede County*, 68.

TO BE ESTIMATED IN APPORTIONING ESTATE OF DECEDENT. See in the Matter of McCune's Estate, 200

## INTOXICATING LIQUORS.

INDICTMENT FOR SELLING INTOXICATING LIQUORS. Where a criminal statute uses disjunctive language in defining an offense, an indictment under it may be drawn in the conjunctive. Thus, a statute made it an offense to "sell *or* give away" intoxicating liquors under certain circumstances An indictment charged that defendant did "sell *and* give away" such liquors. *Held*, that it was not bad for duplicity. *The State v. Pittman*, 56.

## JOINT STOCK COMPANY.

CONVERTED INTO A CORPORATION: TITLE TO ITS LANDS. See Frank v. Drenkhahn, 508.

## JUDGMENT.

1. JUSTICE'S JUDGMENT: FILING TRANSCRIPT IN CIRCUIT COURT: LIEN. The filing of a transcript of a justice's judgment in the office of the clerk of the circuit court more than three years after the rendition of the judgment, without its being first revived, does not create a lien on the lands of the defendant, or authorize the issuing of an execution. *Pears v. Goff*, 92.

2. ——: ——: EFFECT OF JUDGMENT ON DELINQUENT LIST. Where a judgment of the county court upon the delinquent tax list expressly avers that the collector has given due notice, a tax deed founded upon the judgment cannot be attacked by showing that the printer failed to affix to the copy of the newspaper containing the list, which, in compliance with the statute, was filed in court at the time the judgment was rendered, his certificate under oath showing the due publication thereof.

But per NORTON and RAY, JJ., dissenting: Without the printer's certificate the county court had no jurisdiction to enter judgment, and the judgment is void. *Raley v. Guinn*, 263.

3. PARTNERSHIP: JUDGMENT. A judgment in favor of a firm is not void because entered in the name of the firm instead of the individuals composing the firm. *Davis v. Kline*, 310.

4. STATUTORY SALE: COLLATERAL ATTACK: DEED. A special statute authorized a guardian to sell certain lands of his wards and invest the proceeds—the sale to be approved by the county court. Some of the proceedings of the guardian were informal and irregular, but the county court approved the sale. *Held*, that its action could not be attacked collaterally. *Held*, further, that the statute prescribing no form of deed to be given to the purchaser, a conveyance was valid, though it was not in the form required by the general law. *Exendine v. Morris*, 416.

5. JUDGMENT NUNC PRO TUNC: EFFECT ON RIGHTS OF THIRD PARTIES. It is well settled that a judgment *nunc pro tunc* cannot be made to operate to the prejudice of the rights of third parties acquired in good faith between the time of the rendition of the original judgment and the entry of the judgment *nunc pro tunc*. Hence, where a lot set off by a decree in partition to one of the parties was by her sold to a stranger, and afterward the decree, which, as at first entered, contained no order in relation to costs, was amended *nunc pro tunc*, so as to authorize the issuance of an execution for the costs, and an execution was issued and the lot sold thereunder; *Held*, that the purchaser at the execution sale acquired no title as against the other purchaser, it not appearing that the latter at the time of his purchase had any knowledge or notice of the facts which authorized the correction of the judgment. *McClannahan v. Smith*, 428.

6. JUDGMENT CANNOT BE ASSIGNED IN PART. An assignment of part of a judgment made without the consent of the debtor, is void both at law and in equity. *Loomis v. Robinson*, 488.

7. JUDGMENT NUNC PRO TUNC AT SUBSEQUENT TERM. Where the clerk fails to enter a judgment or enters an erroneous one, the court, at a subsequent term, may order the actual judgment entered *nunc pro tunc*. *Belkin v. Rhodes*, 643.

8. ———: MUST BE BASED ON RECORD. An entry of judgment *nunc pro tunc* at a subsequent term must be based on the judge's minutes or the clerk's entries, or on some paper on file in the case. It cannot be made upon the judge's recollection of what took place at the trial, or upon outside evidence. *Ib.*

9. ———: PRESUMPTION: ORDER REVIEWABLE ON APPEAL. The presumption is, that a judgment entered *nunc pro tunc* at a subsequent term was based upon competent evidence. But where the facts appear, the action of the court may be reviewed on appeal. *Ib.*

10. IRREGULARITY: DEFAULT: WAIVER. The name of one of several defendants did not appear in the petition when filed or the writ when issued, but was added before service. He did not appear and judgment was entered against him by default. *Held*, that the objection was waived. *Ib.*

## JURY.

JUROR: MALE CITIZEN. A person summoned as a juror had been living in the county about two months, having come thither from another state, with the intention of making it his permanent home; *Held*, that under a statute which required every juror to be "a male citizen of the State and a resident of the county," he was qualified to serve. *The State v. France*, 681.

EXCEPTIONS TO ITS CONSTITUTION. See The State v. Cavanaugh, 53.

## JUSTICES' COURTS.

1. THE SUMMONS. While section 16, chapter 82, Wagner's Statutes, (p. 815,) was in force, a summons issued by a justice of the peace was not required to contain a statement of the nature of the suit and the sum demanded. This statement was required for the first time by section 2858, Revised Statutes 1879. *Anthony v. The St. Louis, Iron Mountain & Southern Railway Company*, 18.

2. JUDGMENT: FILING TRANSCRIPT IN CIRCUIT COURT: LIEN. The filing of a transcript of a justice's judgment in the office of the clerk of the circuit court more than three years after the rendition of the judgment, without its being first revived, does not create a lien on the lands of the defendant, or authorize the issuing of an execution. *Pears v. Goff*, 92.

3. BACK TAXES: JUSTICE'S JURISDICTION. Under the present law justices of the peace have jurisdiction of suits for the collection of back taxes, and if the summons be returned *non est*, may order publication to be made. R. S. 1879, §§ 6836, 6838. *The State ex rel. Petts v. Staley*, 158.

4. AMENDMENTS. Justices of the peace have power to permit amendments not changing the cause of action. *Turner v. The St. Louis & San Francisco Railway Company*, 261.

5. JURISDICTION. A justice of the peace has no jurisdiction of an action for a breach of covenant of warranty of title to real estate. *Bredwell v. The Loan & Investment Company*, 321.

6. JUSTICES' COURTS: JURISDICTION: PRACTICE. If a defendant in a case appealed from a justice of the peace appears at the trial in the circuit court, he thereby waives any right he may have had to object to the jurisdiction of the justice. *Reddick v. Newburn*, 423

KANSAS CITY.

KANSAS CITY POLICE: POWER TO ARREST WITHOUT WARRANT. The police of Kansas City are authorized to make arrests within the limits of the city without warrant. Acts 1874, p. 329, § 5; Acts 1875, p. 195, § 3. But if an arrest be for a past act, whether misdemeanor or felony, it can be made without warrant only when the officer has grounds of reasonable suspicion, such as would justify him at common law in arresting for a past felony. *The State v. Grant*, 236.

LAND TITLES.

THE title to land cannot be established by the mere oral statements of witnesses. *Turner v. Williams*, 617.

LANDLORD AND TENANT.

FIXTURES. See Thomas v. Davis, 72.

LIEN FOR RENT. See The State ex rel. Wright v. Adams, 605.

LARCENY.

1. A larceny may be regarded as still in process of accomplishment so long as the original caption is still unbroken and the original asportation is yet in progress. *The State v. Grant*, 236.

2. ATTEMPT TO STEAL. The description of the property need not be as particular in an indictment for an attempt to commit a larceny as in one for an accomplished larceny. *The State v. Hughes*, 323.

3. BURGLARY AND LARCENY: AUTREFOIS CONVICT. Burglary and larceny, committed at the same time, are distinct offenses. A conviction of one is not a bar to a prosecution for the other. *The State v. Martin*, 337.

4. ON an indictment for stealing from a store certain specified articles of merchandise, an instruction that the prisoner may be convicted if he "feloniously took *any* of of the goods then in the store," is erroneous. And so is an instruction that he is guilty if he "feloniously took *or* carried away any of the goods." *The State v. Babb*, 501.

5. PRESUMPTION OF GUILT FROM RECENT POSSESSION. The presumption of guilt from recent possession of stolen property, is not confined to cases of theft, nor to any class or species of felony, but is applied even in cases where the highest penalties are inflicted. *Ib.*

6. IDENTITY, OPINIONS ADMISSIBLE AS TO. On a trial for larceny a witness will be allowed to give his opinion, based on his personal knowledge, as to the identity of goods found on the defendant, though he cannot swear positively. *Ib.*

7. BURGLARY AND LARCENY COMMITTED TOGETHER. Although the statute permits the offenses of burglary and larceny, when committed together, to be charged in one count, they nevertheless remain distinct offenses, and the jury is not bound to find the defendant guilty of one because he is guilty of the other. *The State v. Kelsoe*, 505.

## LIBEL.

PUBLICATION ACTIONABLE PER SE. The publication in a newspaper of a false statement that a person was convicted and sentenced to prison for libel, is actionable without proof of special damages. *Boogher v. Knapp*, 457.

## LIMITATIONS.

ADVERSE POSSESSION. Broadstreet v. Kinsella, 63.

## MALICIOUS PROSECUTION.

1. PROBABLE CAUSE: MALICE. It is essential to recovery in an action for malicious prosecution, that the prosecution should be ended, and that it should have been instituted maliciously and without probable cause.

If there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable.

The proof of malice does not establish the want of probable cause, nor does the want of probable cause necessarily establish the existence of malice. That is to say, malice is not an inference of law from want of probable cause. Malice need not, however, be proved by direct and positive testimony, but may be inferred from the facts which go to establish want of probable cause.

That reasonable and probable cause which will relieve a prose-

cutor from liability is a belief by him in the guilt of the accused, based upon circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man. *Sharpe v. Johnston*, 660.

2. ———: THE FINDING OF AN INDICTMENT: REFUSAL OF MAGISTRATE TO COMMIT. The action of a grand jury in finding a bill of indictment, or the commitment of the prisoner by the examining magistrate, is *prima facie* evidence of probable cause. The refusal of the magistrate to bind over is very persuasive evidence of want of probable cause.

When an indictment has been found, or the defendant has been committed by the examining magistrate, this *prima facie* evidence of probable cause may be rebutted or overthrown by evidence showing that such indictment or commitment was obtained by false or fraudulent testimony or other improper means, or by evidence showing that the prosecutor, notwithstanding the action of the grand jury or the committing magistrate, did not himself believe the defendant to be guilty.

When the examining magistrate refuses to commit, and it is thus determined that there is no probable cause for the prosecution, any inference of malice which may be drawn from such fact, will be overcome by showing that the prosecutor, after having fully informed himself as to all ascertainable facts bearing upon the guilt or innocence of the prisoner, and having fully and fairly communicated the same to reputable counsel, instituted the proceeding under the opinion of such counsel, that the plaintiff was legally subject to criminal charge, and himself believed such advice to be correct and that the plaintiff was guilty. *Ib.*

3. ———: ———: ———: APPEARANCE BEFORE GRAND JURY: FALSE TESTIMONY. When the prisoner is discharged by the examining magistrate and afterward the prosecutor voluntarily appears or causes himself to be summoned before the grand jury and procures the prisoner to be indicted for the same offense charged before the magistrate, this would be the institution of a second and independent prosecution, for which he could be held liable if he acted maliciously and without probable cause; but if in such case the prosecutor should not voluntarily appear, but should be summoned before the grand jury without his own procurement, he would not be liable to an action, unless the testimony given by him on which the indictment was founded was false or fraudulent. *Ib.*

4. ———: TWO INDICTMENTS, WHEN THEY MAY AND WHEN MAY NOT CONSTITUTE SEPARATE CAUSES OF ACTION. When two indictments are found for the same offense, and the second is preferred solely on account of some formal defect in the first, and the first is thereby suspended and is quashed, no action for malicious prosecution can be based upon the order of the court discharging the prisoner from the first. Even if the first be quashed before the second is found, if the court commits or recognizes the prisoner to answer a new indictment such new indictment could not be regarded as the institution of a new prosecution, but as a continuation of the proceedings under the first indictment. *Ib.*

5. ———: FACTS CONSTITUTING MALICE, A QUESTION OF LAW. In an action for malicious prosecution it should not be left to the jury to determine what facts will warrant the inference of malice. This is

a question of law for the court. The proper way is to instruct the jury what facts, if found by them, will warrant the inference. *Ib.*

6. ——: ADVICE OF COUNSEL: GOOD FAITH. The discharge of the prisoner by the committing magistrate is *prima facie* evidence of want of probable cause, although counsel may have advised that he was criminally liable; and although the prosecutor may have communicated to counsel all the facts and circumstances bearing upon the guilt or innocence of the prisoner, which he knew or by reasonable diligence could have ascertained, yet if, notwithstanding the advice of counsel, he believed that the prosecution must fail and was actuated not simply by angry passions or hostile feelings, but by a desire to injure and wrong the prisoner, he cannot be said to have consulted counsel in good faith, and a jury will be warranted in finding that the prosecution is malicious. *Ib.*

## MANDAMUS.

1. MANDAMUS TO COMPEL BOARD OF CANVASSERS TO COUNT RETURNS. Where it appeared that a board of canvassers of election returns had completed the canvass and made out an abstract of the votes before the expiration of the time limited by law for the performance of these duties, but the abstract was still in the custody of a member of the board when notice was given them of an alternative writ of mandamus sued out within that time, requiring them to count certain votes which they had illegally rejected; *Held*, that the writ was properly issued and should be made peremptory, and this though it might have been true that the board had finally adjourned when the notice was served. *The State ex rel. Broadhead v. Berg*, 136.

2. IN MANDAMUS PROCEEDINGS. The costs of a mandamus proceeding are to be adjudged only against such of the respondents as are found to have refused to do their duty. *The State ex rel. Broadhead v. Berg*, 136.

3. APPEAL: SUPERSEDEAS. An appeal, with the statutory bond, from a judgment awarding a peremptory *mandamus*, operates as a *supersedeas*. *The State ex rel. The Laclede Bank v. Lewis*, 370.

4. "PROCEEDINGS:" "EXECUTION." The term "execution" in section 3713, Revised Statutes, and the term "proceedings" in sections 3717, 3718, are used interchangeably and include a peremptory writ of *mandamus*. *Ib.*

5. THE original history and nature of the writ of *mandamus* reviewed. *Ib.*

6. IF a judge erroneously refuses to have judgment entered upon a verdict, he will be compelled by mandamus. *The State ex rel. Wright v. Adams*, 605.

## MECHANICS' LIEN.

1. IT is error for the court to establish a mechanic's lien without a finding by the jury that the plaintiff is entitled to the lien. *Brooks v. Blackwell*, 309.

2. MECHANIC'S LIEN: *Fitzgerald v. Thomas* and *Fitzpatrick v. Thomas*, 61 Mo. 499, 512, 515, affirmed. *Fitzpatrick v. Thomas*, 513.

AGAINST RAILROADS. See Morgan v. Chicago & Alton Railroad Company, 161.

## MUNICIPAL CORPORATION.

1. DANGEROUS SIDEWALKS. The plaintiff, a woman, while walking slowly and carefully in the night on a sidewalk in the City of Kansas, slipped and fell into a gully close to the walk, of which she knew nothing, but which had existed for several years. *Held*, that the city was liable. *Halpin v. The City of Kansas*, 335.

2. "PROPER AUTHORITIES OF THE CITY:" MEANING OF THE PHRASE. Section 67, page 315d, Wagner's Statutes, provides that any union depot company, with the consent of "the proper authorities of the city" inwhich the depot is to be constructed, shall have the right to lay tracks and erect buildings on streets; *Held*, that the phrase "proper authorities of the city" referred only to those properly so called, and did not include the county court. *The Union Depot Company v. The City of St. Louis*, 393.

3. ESTOPPEL. Where a municipal corporation enters into a contract within its powers, the doctrine of estoppel applies with the same force as against individuals. *Ib.*

4. MUNICIPAL ORDINANCES: RULES OF CONSTRUCTION. The charter and ordinances of a city stand in the same relation to each other as the constitution and statutes of a state, and the rules applicable in deciding questions of conflict between the latter may be resorted to to determine similar questions between the former. *Quinette v. The City of St. Louis*, 402.

5. ——: ——: PAY OF OFFICERS OF ELECTION. Where a city charter provided that judges of election should receive no pay, and repealed all existing ordinances inconsistent with its provisions; *Held*, that an ordinance then in force providing for the pay of judges and clerks of election was repealed only so far as it related to the judges, and the clerks were entitled to pay at the rate fixed by the ordinance. *Ib.*

6. THE "MUNICIPAL CORPORATIONS" mentioned in section 1, article 10 of the constitution, are those which derive their existence from legislative enactment. The city of St. Louis is not included in the term. *The City of St. Louis v. Bircher*, 431.

7. THE ORDINANCE OF THE CITY OF ST. LOUIS licensing hotels and boarding houses is valid. *St. Louis v. Bircher*, 7 Mo. App. 169, affirmed. *Ib.*

8. DEFECTIVE SIDEWALK: DAMAGES: PLEADING. In an action against a city for personal injuries caused by failure to keep a sidewalk in repair, it is not essential that the petition should allege that the city owned the sidewalk, or authorized its construction or had adopted it as its own. Other allegations made in this case showing the duty of the city to keep the sidewalk in repair; *Held*, sufficient. *Haire v. The City of Kansas*, 438.

SEE KANSAS CITY.

ST. LOUIS.

## MURDER.

1. THE INDICTMENT. An indictment for murder need not specify the particular part of the body upon which the mortal wound was inflicted. *The State v. Sanders*, 35.

2. ——: EVIDENCE. Where an indictment for murder charges the infliction of one mortal wound, it is no error to admit evidence of several wounds, one of which was mortal. *Ib.*

3. IMMEDIATELY after defendant had committed a homicide, he was seized by a by-stander, whom he attempted to stab in order to escape. Upon a trial for the homicide; *Held*, that proof of the attempt to stab was admissible. *Ib.*

4. "DELIBERATELY:" "COOL STATE OF THE BLOOD." The court again approves the definitions heretofore given of these terms. *The State v. Andrew*, 101.

5. "HEAT OF PASSION." The courts should not use this expression in instructions without explaining its technical meaning. *Ib.*

6. HOMICIDE: KILLING OF OFFICER. Where the State relies upon the fact that the victim of a homicide was an officer acting in the discharge of his duty to fix the character of the offense, it should be shown that the slayer knew the fact. *The State v. Grant*, 236.

7. MURDER IN THE FIRST DEGREE. The deliberation and premeditation necessary to constitute murder in the first degree may be inferred from all the facts and circumstances of the killing. *Ib.*

8. AN instruction that if the defendant maliciously shot and killed deceased with a rifle, the law presumes the killing to be murder in the second degree unless it is shown to have been justifiable on the ground of self-defense or within some other degree of homicide, *Held*, error. *The State v. Phelps*, 319.

9. DELIBERATION: INSTRUCTIONS, HARMLESS ERROR IN. An instruction in a murder case defining the word deliberately to mean, "done in a cool state of the blood—that is, not in a heated state of the blood caused by lawful provocation;" *Held*, error; but the record in the case disclosing no evidence of provocation either by words or acts of the deceased, or of the existence of such passion on the

part of defendant as would mitigate the homicide; *Held*, that the error was immaterial. *The State v. McGinnis*, 326.

10. HOMICIDE: EVIDENCE OF CONDITIONAL THREATS. On a trial for homicide evidence of conditional threats made by the prisoner is admissible; and it may be no objection that they were made two months before the homicide. *The State v. Adams*, 355.

11. "PREMEDITATION" is a necessary element of the crime of murder in the second degree, and it is the duty of the court to define the term to the jury. *The State v. Harris*, 361.

12. DEFINITION OF "PREMEDITATION." The correct meaning of "premeditation" is "thought of beforehand for any length of time however short." An instruction, therefore, which defines the term as "thought of for any length of time however short," is erroneous. *Ib.*

13. MURDER IN SECOND DEGREE: PRESUMPTION. A killing with a deadly weapon is not presumed murder in the second degree, unless it is willful or intentional. *Ib.*

14. THREATS COMMUNICATED TO DEFENDANT. On a trial for murder evidence of a threat made by the deceased and communicated to the defendant before the killing by a person since dead, is admissible. *Ib.*

15. SELF-DEFENSE: APPARENT DANGER. The acting on a reasonable belief of harm, though unfounded, excuses the defendant. But this principle has no application, and instructions embodying it should not be given, in a case where the hostile demonstration which induced the act was made with a real and not an apparent deadly missile or weapon, the exact nature of which the defendant could see. *The State v. Umfried*, 404.

16. THE court instructed the jury that "if the defendant killed deceased with a pistol or revolver, by shooting him, the law presumes it is murder, in the absence of proof to the contrary." *Held*, error, because the elements of malice, intention, premeditation and deliberation were wholly excluded from the consideration of the jury. *The State v. Bohanan*, 562.

17. HOMICIDE: WIFE'S, INFIDELITY. To reduce a homicide to manslaughter on the ground of illicit intercourse between the deceased and the wife of the defendant, the detection must have been in the very act, and the killing instant upon the detection. *The State v. France*, 681.

## NATIONAL BANKS.

THEIR POWER TO SELL THEIR OWN STOCK.—When a National bank purchases its own stock to protect itself from loss upon a debt, it is bound to sell the stock within six months, and may sell on credit and take the purchaser's note, with the stock sold as collateral to secure it, provided this is done in good faith. *The Union National Bank v. Hunt*, 439.

## NEGLIGENCE.

1. RAILROAD: RATE OF SPEED. Aside from statutory or municipal regulation, no rate of speed at which a railroad train may be run is negligence *per se*. *Powell v. The Missouri Pacific Railway Company*, 80.

2. CONTRIBUTORY NEGLIGENCE: COURT, WHEN BOUND TO INSTRUCT FOR DEFENDANT. In an action grounded upon allegations of negligence, if the undisputed facts show that notwithstanding the defendant's negligence the plaintiff would not have sustained the injuries complained of but for his own negligence directly tending to produce them, it is the duty of the court to direct the jury to find for defendant. *Ib.*

3. CONTRIBUTORY NEGLIGENCE. It is the duty of the court, when the facts constituting direct contributory negligence are undisputed to declare to the jury that they bar recovery by the plaintiff. *Lenix v. The Missouri Pacific Railway Company*, 86.

4. WHERE the defense of contributory negligence is pleaded it should not be omitted from the instructions. *Gilson v. The Jackson County Horse Railway Company*, 282.

SEE RAILROADS.

## NEGOTIABLE PAPERS.

TRANSFER IN PAYMENT: INNOCENT HOLDER. *Semble* that in Missouri negotiable paper taken without notice before maturity, as absolute payment of an antecedent debt, and not merely as collateral, though the debt thus discharged is a simple contract debt, and no security is given up, places the holder in the position of an innocent holder for value, not affected by any equities between the original parties to the note. *Hodges v. Black*, 537.

## NOTARY PUBLIC.

POWER TO COMMIT FOR CONTEMPT. See ex parte. Priest, 229.

## NUISANCE.

OBSTRUCTION OF ROAD: DAMAGES. Where adjoining proprietors by agreement closed a dedicated highway, and in place of it opened a road upon another site; *Held*, that whether the road so opened was a public highway or a private right of way, they and those claiming under them had such an interest in it as entitled them to recover damages from a railroad company crossing it in such a manner as to obstruct its free use. *The Kansas City, St. Louis & Chicago Railroad Company v. Farrell*, 183.

## NUNC PRO TUNC ENTRIES.

JUDGMENT NUNC PRO TUNC. See Belkin v. Rhodes, 543.

———: INEFFECTUAL AGAINST INNOCENT PURCHASERS. See McClannahan v. Smith, 428.

## OFFICES AND OFFICERS.

1. PUBLIC OFFICERS: THEIR COMPENSATION. The right of a public officer to compensation for his services is derived from the statute. Unless that gives it he must perform his duties without compensation. *Gammon v. Lafayette County*, 675.

2. PROBATE JUDGES: FEES. Probate judges are not entitled to fees for entering orders opening and adjourning court. *Ib.*

INACCURATE DESIGNATION OF, IN ELECTION RETURNS. See The State ex rel. Broadhead v. Berg, 136.

——— IN COUNTY COURT RECORD. See Raley v. Guinn, 263.

SLAYING OF OFFICER. See The State v. Grant, 236.

## OFFICIAL BOND.

1. A BOND IS NOT INVALID as a statutory bond merely because it does not follow the exact words of the statute. *Newton v. Cox*, 352.

2. OBLIGATION CONFINED TO EXPRESS TERMS. Under the charter of the city of H. the marshal was required to give bond in a sum not exceeding $2,000 "for the faithful performance of his duties as city marshal." The marshal was also made *ex-officio* collector, and required to give such bond as the city council should direct. A bond for the sum of $3,000, after reciting that one P. had been elected marshal of the city of H., provided that P. should discharge all the duties of said office and should pay over to the proper persons and the city of H. "all moneys and effects to them or her in anywise belonging or pertaining that may come into his hands." P. collected a large amount of city taxes which he failed to pay over. *Held*, that the sureties on this bond were not liable. *The City of Harrisonville v. Porter*, 358.

3. THE OBLIGATIONS OF SURETIES are strictly construed, and the fact that the bond was for $1,000 in excess of the amount required of the marshal did not extend the liability of the sureties. *Ib.*

## PARENT AND CHILD.

1. FATHER'S RIGHT TO CUSTODY OF HIS MINOR CHILD: CHILD'S WELFARE THE FIRST CONSIDERATION. In a contest for the possession of the per-

son of a minor child, the welfare of the child is always the controlling consideration with the courts. If the contest is by a father seeking to regain his child, as he is its natural guardian and as such entitled to the custody of its person, it will be awarded to him, unless he is shown to be, for some reason, unfit or incompetent to take charge of the child, or unless the welfare of the child, for some special or extraordinary reason, demands a different disposition. *In the Matter of Berenice S. Scarritt*, 565.

2. ——: CONTRACT OF FATHER TO SURRENDER CUSTODY OF CHILD. By the common law, a father cannot irrevocably divest himself of his right and duty to have the custody and charge of his child. They spring from the law of nature; and public policy, for the good of society, will not permit him to abandon them. *Ib.*

3. ——: CASE ADJUDGED. In the present case, a father sought to regain the custody of his child, a girl between six and seven years of age, from her maternal grand-parents. He had himself upon the death of his wife, the child's mother, at the solicitation of its grand-parents, placed the child (then a baby) in their care, to remain, as he expressed it in a letter, "until, at least, she passes her first decade in life." Some years afterward, he married again, established a home, and was desirous of taking the child to live with him; but the grand-parents declined to give her up. The court, upon consideration of all the circumstances, *Held*, that there was nothing in them which authorized a departure from the general rule, which gives the custody of the child to its father; that, indeed, the welfare of the child would be better promoted by giving her to her father than by leaving her with her grand-parents; and as to the letter (which the latter claimed amounted to a contract), that it was written under such circumstances that it ought not to be so considered, even if, as a contract, it would be held binding. For these reasons the child was ordered to be delivered into the custody of the father.

*Contra.* It was established by the evidence that the welfare of the child did not require a change of custody; and as it was clearly shown that the attachment between the grand-parents and the child was as intense as that which exists between parent and child and the father by his conduct and agreement had encouraged and developed this attachment, he ought not to be permitted to sunder the relations between them. The interest and welfare of the child is certainly the paramount consideration, but the interests, feelings and welfare of the person to whom the child has been confided, should not be entirely disregarded. The court ought to consider the strength of the ties that have been formed between the child and its grand-parents. Per HENRY, J., dissenting. *Ib.*

## PARTIES.

PROPER PLAINTIFF IN SUIT FOR MARRIED WOMAN'S LAND. See Kanaga v. St. Louis, Lawrence & Western Railroad Company, 207.

## PARTNERSHIP.

1. PARTNERSHIP: JUDGMENT. A judgment in favor of a firm is not void because entered in the name of the firm instead of the individuals composing the firm. *Davis v. Kline*, 310.

2. THE adjustment of partnership accounts is a matter of equitable jurisdiction. *Hodges v. Black*, 537.

3. AN agreement to share profits is *prima facie* an agreement for a partnership; but the contrary may be shown. *Philips v. Samuel*, 657.

## PERSONAL INJURIES.

INJURIES RESULTING IN DEATH: ACTION UNDER STATUTE: "FAILS TO SUE." Under the statute, (R. S., §§ 2121, 2122, 2123,) the action for injuries resulting in death may be brought, 1st, "By the husband or wife of the deceased; or, 2nd, If there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased." M. being killed through the alleged negligence of the defendant, his widow brought an action against defendant, which action she voluntarily dismissed. The minor children after the expiration of six months from the death of their father commenced another action. *Held*, this action would not lie, as the wife had not "failed to sue" within the statute. *McNamara v. Slavens*, 329.

## PHYSICIAN.

UNLAWFUL PRACTITIONER: INDICTMENT. An indictment for practicing medicine in violation of law, need not state the name of the person upon whom or in whose family the defendant practiced. *The State v. Little*, 52.

HIS COMPETENCY AS A WITNESS. See Gartside v. The Connecticut Mutual Life Insurance Company, 446.

## PLEADING.

1. THE PETITION in this case, *Held*, to state but a single cause of action, and not two improperly blended in one count. *Hale v. Stuart*, 20.

2. IN EJECTMENT. Defendant in ejectment may set up in his answer any and all equitable defenses he may have. *Chouteau v. Gibson*, 38.

3. VENUE. In an action for damages for injury to property situated upon plaintiff's farm, it is not necessary to indicate the locality of the farm otherwise than by the venue laid in the margin of the petition. *Palmer v. The Missouri Pacific Railway Company*, 217.

4. PLEADING NEGLIGENCE. The petition in this case charges negligence with sufficient precision, and shows clearly the connection between the negligence and the injury sustained by plaintiff. *Ib.*

5. EQUITY PLEADING: MULTIFARIOUSNESS. A bill against several defendants to set aside several distinct conveyances made to them separately on the ground of fraud—one general right being claimed—is not multifarious. *Bobb v. Bobb*, 419.

6. ACTION FOR REAL ESTATE: GENERAL DENIAL: EVIDENCE. In an action involving title to real estate, the defense of adverse possession for the statutory period is admissible under a general denial of the plaintiff's title. *Hill v. Bailey*, 454.

7. A PETITION OBJECTIONABLE for not being sufficiently specific, may be good after verdict. *Ellet v. St. Louis, Kansas City & Northern Railway Company*, 518.

8. PLEADING: SPECIAL PLEA: GENERAL DENIAL. In an action against a railroad company for the death of a passenger, the negligence alleged was the want of care in the servants of the company and defects in its road. The defendant denied all the allegations of the petition, and also filed a special plea alleging that the road was well constructed, the servants skillful and careful, but that the casualty was caused by an extraordinary rain storm. *Held*, that this matter could be shown under the general denial, and the special plea was properly stricken out. *Ellet v. The St. Louis, Kansas City & Northern Railway Company*, 518.

9. PLEADING: SPECIFIC ALLEGATIONS: NEGLIGENCE. A petition charging negligence in a railroad company in conducting and running its train, where the negligence complained of is that of the engineer in managing it at the time of the casualty, is sufficiently specific. *Ib.*

10. ———. When the answer, after admitting the plaintiff's *prima facie* case, sets up a purely equitable defense, this converts the case wholly into an equitable proceeding. *Hodges v. Black*, 537.

11. A DEFENSE CANNOT BE SET UP for the first time in the appellate court. *St. Louis Brokerage Company v. Bagnell*, 554.

12. PLEADING BREACH OF DUTY. Where an action is grounded on a breach of duty, the facts out of which the duty arises must be pleaded. The plaintiff must state the facts which constitute his cause of action. He cannot state one and prove another; nor if he fails to state any, can he supply the defects in his petition by evidence at the trial. *Field v. The Chicago, Rock Island & Pacific Railway Company*, 614.

## PLEADING, CRIMINAL.

1. UNLAWFUL PRACTITIONER: INDICTMENT. An indictment for practicing medicine in violation of law, need not state the name of the person upon whom or in whose family the defendant practiced. *The State v. Little*, 52.

2. INDICTMENT FOR SELLING INTOXICATING LIQUORS. Where a criminal statute uses disjunctive language in defining an offense, an indictment under it may be drawn in the conjunctive. Thus, a statute made it an offense to "sell *or* give away" intoxicating liquors under certain circumstances. An indictment charged that defendant did "sell *and* give away" such liquors. *Held*, that it was not bad for duplicity. *The State v. Pittman*, 56.

3. INDICTMENT FOR CONCEALING BIRTH OF CHILD. An indictment against a woman for endeavoring to conceal the birth of a child, of which she has been delivered, by secretly burying the same, will be good if it follows the language of the statute. It need not allege any specific intent on her part; and it is immaterial whether the child was still-born or not. *State v. White*, 96.

4. KEEPING BAWDY HOUSE. An indictment for keeping a bawdy house is well enough if it follows the language of the statute. *The State v. Bregard*, 322.

5. WHERE a statute uses disjunctive language in defining an offense, an indictment under it may be drawn in the conjunctive. *Ib.*

6. LARCENY. The description of the property need not be as particular in an indictment for an attempt to commit a larceny as in one for an accomplished larceny. *The State v. Hughes*, 323.

PLEDGE.

TO SECURE RENT. See the State ex rel. Wright v. Adams, 605.

POWERS.

1. POWER BY WILL TO CONVEY. A will was as follows: "I will and bequeath to my wife all my real estate, to do with as she shall wish for her own use while she continues my widow. I will that she shall sell one lot," (describing it,) "and apply the proceeds to her own use." As to the lot described, *Held*, (without deciding what estate the widow took in it,) that the power of sale vested in her carried with it the power to convey the fee. *Boyer v. Allen*, 498.

2. THE CONVEYANCE in fee of a specific tract of land for a valuable consideration by a widow to whom her husband's will gave the power so to convey, *Held*, effectual to pass the fee, although it contained no reference to the will or the power; and although the will gave her the use of all the testator's real estate during widowhood. *Ib.*

POWER TO CONVEY TRUST PROPERTY. See Broadstreet v. Kinsella, 63.

PRACTICE.

1. ON APPEAL. THIS court will not review errors in instructions, unless they were called to the attention of the trial court in the motion for new trial. *Anthony v. The St. Louis, Iron Mountain & Southern Railway Company*, 18.

2. A remark of the judge of the trial court in relation to the evidence, made in the presence of the jury; *Held*, not to be such as to call for a reversal. *The State v. Sanders*, 35.

3. BILL OF EXCEPTIONS. The Supreme Court will not review the action of the trial court on a motion involving the hearing of testimony, upon a bill of exceptions taken at another stage of the proceedings and at a subsequent term. *The State ex rel. Armentrout v. Grant*, 95.

4. ADMITTING EVIDENCE OUT OF ORDER. A sound exercise of the discretion vested in the trial courts of determining whether or not evidence should be received out of time, requires that when it appears that failure to offer material evidence in proper time was the result of inadvertence and that it was not kept back by a trick or for any unfair purpose and that the other party will not be deceived or injuriously affected by it, it should be let in even after a demurrer to the evidence has been sustained. For refusal of the trial court so to do, this court will reverse. *Tierney v. Spiva*, 279.

5. AMENDMENTS. In an action instituted before a justice of the peace, a judgment for the plaintiff being held to be erroneous because of a defect in the statement; *Held*, further, that as a proper amednment could be made in the circuit court, the case should be remanded to that court and not be dismissed. *Schulte v. The St. Louis, Iron Mountain & Southern Railway Company*, 324.

6. FAILURE to incorporate the motion for new trial in the bill of exceptions prevents inquiry in this court into anything which occurred during the progress of the trial, and which is necessary to be preserved in the bill of exceptions, equally as much in cases in equity as at law. *McCarthy v. McGinnis*, 344.

7. EXCEPTIONS. Where the record does not show that exception was taken to the action of the trial court in overruling the motions for newtrial and in arrest of judgment, and no error appears in the record proper, the judgment will be affirmed. *Wilson v. Haxby*, 345.

8. JUSTICES' COURTS: JURISDICTION: PRACTICE. If a defendant in a case appealed from a justice of the peace appears at the trial in the circuit court, he thereby waives any right he may have had to object to the jurisdiction of the justice. *Reddick v. Newburn*, 423.

9. AMENDMENT OF PLEADINGS AFTER JUDGMENT. After a motion for new trial had been overruled, the court permitted the *ad damnum* clause of the petition to be amended to conform to the proof whereby the plaintiff's claim for damages was increased from $100 to $500. *Held*, no error. *McClannahan v. Smith*, 428.

10. NEW TRIAL FOR VARIANCE. To obtain a new trial on the ground of variance between the pleadings and the proof, a party must show by affidavit not only that he was misled but also in what respect he was misled. *Shelton v. Durham*, 434.

11. OBJECTION TO EVIDENCE. THE RECORD. This court will not consider objections to evidence unless the record shows the specific grounds upon which they are based. *Ib.*

12. JUSTICE'S COURT: NEW DEFENSE ON APPEAL TO CIRCUIT COURT. On an appeal from a justice's court, the defendant offered to show for the first time that the plaintiff had not the legal capacity to sue.

The circuit court rejected the defense because it had not been made in the justice's court. *Held*, error. *Compton v. Parsons*, 455.

13. EVIDENCE: LIMITING ITS USES. Certain admissions made by persons with whom the defendants in this case were in privity; *Held*, to have been properly admitted in evidence; and although some of them may not have been competent as against all of the defendants, yet as the court was not asked to instruct the jury against which it could be used and against which not, there was no error. *Babb v. Ellis*, 459.

14. SECOND NEW TRIAL. Where the jury have found a verdict in consonance with the law and the facts of the case, the fact that the court gave erroneous instructions will not authorize the granting of a second new trial. *The State ex rel. Wright v. Adams*, 605.

15. It is no error to permit the defendant to read the plaintiff's petition to the jury. *Coe v. Griggs*, 619.

16. WITNESS: DILIGENCE IN PROCURING HIS ATTENDANCE: NEW TRIAL. A party relying upon the promise of a witness to attend and testify, failed to have him subpœnaed. He was present about the time the case was called for trial, but afterward absented himself and a subpœna then issued could not be served because he could not be found. *Held*, that no diligence had been exercised to procure his attendance, and his absence was no ground for a new trial. *Roach v. Colbern*, 653.

17. NEW TRIAL: CUMULATIVE EVIDENCE. A new trial will not be granted on the ground of failure to obtain evidence which is merely cumulative. *Ib.*

18. PRACTICE. In a suit to enjoin a judgment on the ground of surprise, the court, without setting aside the judgment, examined into the merits of the original case, and finding that there was no valid defense, refused the injunction. *Held*, a proper method of procedure. The complainant was not entitled to have the judgment first set aside and his defense then tried by a jury. *Philips v. Samuel*, 657.

19. PRACTICE IN EQUITY: INSTRUCTIONS. Error in instructing the jury upon issues submitted to them in a proceeding in equity will not vitiate the judgment if the evidence warrants the finding. *Ib.*

CHANGE OF VENUE. See The State v. Bohanan, 562.

## PRACTICE, CRIMINAL.

1. REFUSAL OF CONTINUANCE: ERROR CURED. Where it appeared that the trial which succeeded a refused application for a continuance was a mis-trial, and that at the subsequent trial which resulted in defendant's conviction, the witnesses, on account of whose absence the continuance had before been prayed, were present and testified, and that defendant at that trial offered testimony to the contrary of that testified to by the State's witnesses; *Held*, that if there was any

error in refusing the continuance, it afforded no reason for reversing the judgment. *The State v. Cavanaugh*, 53.

2. SPECIAL JUDGE. Under the act of 1877, (Sess. Acts, p. 357, § 1,) to entitle the defendant in a criminal case to be tried by a special judge, it was necessary that the affidavit of prejudice on the part of the regular judge should be supported by the affidavits of two reputable persons. *Ib.*

3. JURY. Where objections are not made and exceptions saved at the proper time, to the manner of summoning a jury, the point will not be regarded in the Supreme Court. *Ib.*

4. IN MISDEMEANOR CASES. Under the act of 1877 in relation to misdemeanors, (Sess. Acts, p. 355, § 6,) no prosecution founded upon an affidavit alone could be sustained. It was necessary that there should be an information by the prosecuting attorney based upon the affidavit. *The State v. Sebecca*, 55

5. CHANGE OF VENUE. A change of venue for prejudice of the inhabitants may be awarded in a criminal case, without previous arraignment of the prisoner *The State v. Andrew*, 101.

6. TWO INDICTMENTS FOR SAME OFFENSE. The fact that two indictments have been found against the prisoner for the same offense, will be no bar to his trial upon one of them, if the other is dismissed before the trial takes place. *Ib.*

7. CONTINUANCE. If no attachment has been taken out for a witness who has been duly subpœnaed, a continuance cannot be granted on account of his absence. *Ib.*

8. CALLING OF WITNESSES. Upon a trial for homicide the State is not bound to call as witnesses all the persons who were present. *The State v. Johnson*, 121.

9. IMPROPER REMARKS OF PROSECUTING ATTORNEY. If the prosecuting attorney is permitted by the trial court, in spite of objections from the defendant, to address improper remarks to the jury, this court will reverse the judgment; but unless it is certain that the remarks were of an improper character, it will not interfere. *Ib.*

10. INSTRUCTING THE JURY It is the duty of the court in criminal cases to define in its instructions only the crimes of which defendant could be convicted under the indictment, and of which there is evidence in the case. *Ib.*

11. GENERAL VERDICT OF GUILTY. If the jury return a general verdict of guilty in a criminal case, it will be presumed, nothing to the contrary appearing, that they failed to agree on the punishment to be inflicted, and so, under the statute, left that to the determination of the court. *The State v. Emery*, 348.

12. HARMLESS ERROR IN ADMITTING EVIDENCE. A judgment ought not to be reversed for the admission of improper evidence where the guilt of defendant is otherwise made so clear that the court cannot say that he was prejudiced. *Ib.*

13. REMARKS OF PROSECUTING ATTORNEY. Not every random or hasty remark of the prosecuting attorney should be made ground for reversing the judgment.
Certain remarks of that officer in this case; *Held*, not to call for reversal. *Ib.*

14. MOTION FILED IN TERM: TIME: CONSTRUCTION OF STATUTE. Section 3558, Revised Statutes, which provides that "motions in a cause filed in term shall be filed at least one day before they may be argued or determined," is for the protection of the adverse party to a motion, and when he does not claim the benefit of it, the party filing it cannot. *The State v. Underwood*, 630.

15. CONTINUANCE: REQUISITES OF AFFIDAVIT. On an application for the continuance of the trial of an indictment for murder on the ground of the absence of witnesses, the affidavit failed to give the names of some of the witnesses, and failed to show the residence of those it did name, or state that they were unknown or that the facts which they were expected to prove were true. *Held*, that the application was properly refused. *Ib.*

16. CONDUCT OF TRIAL: INDISCREET REMARKS OF JUDGE. An indiscreet remark made by the judge during the trial but immediately withdrawn, *Held*, not sufficient to justify interference with a judgment which the evidence supported, where it did not clearly appear that the prisoner was prejudiced. *Ib.*

17 OFFICER IN CHARGE OF JURY: OATH. The officer in charge of a jury is not required to take the oath prescribed by section 1910, Revised Statutes, until the arguments of counsel are closed. *Ib.*

18. CONTINUANCE: "POSTPONEMENT." To style an application for a continuance, an application for a postponement, does not change the legal requisites of the affidavit required to support it. *Ib.*

## PRACTICE IN SUPREME COURT.

1. INSTRUCTIONS. This court cannot reverse for failure to give an instruction, however correctly it may declare the law, where there is no evidence preserved in the record to support it; nor on the other hand will it reverse for the giving of an instruction which, because of the absence of such evidence, could not have harmed the appellant. *The Kansas City, St. Louis & Chicago Railroad Company v. Farrell*, 183.

2. NEW TRIAL: NEWLY DISCOVERED EVIDENCE. The Supreme Court will not reverse a judgment for refusal of the trial court to grant a new trial asked on the ground of newly discovered evidence, when such evidence is merely cumulative and only tends to impeach. *The State v. Willoughby*, 215.

3. PROCEEDINGS TO CONTEST A WILL: WEIGHT OF EVIDENCE. The proceeding under the statute to contest the validity of a will being a proceeding at law, this court will not go into the question of the weight of evidence. *Appleby v. Brock*, 314.

4. ERRONEOUS INSTRUCTIONS. A judgment should not be reversed for error in instructions given for respondent when precisely the same instructions are given for appellant. *Garesche v. President, Directors and Faculty of St. Vincent's College*, 332.

5. EVIDENCE. If there is danger that evidence properly admitted for one purpose may be used by the jury, in making up their verdict, for another and improper purpose, the court should be asked to instruct them as to its proper use. If this is not done, and the appellate court cannot see that they have made a mis-use of it, and there is other evidence sufficient to sustain the verdict, the judgment will not be reversed because of the possible error. *Ib.*

6 PRACTICE IN APPELLATE COURT: FAILURE TO PROSECUTE APPEAL. If motions are filed or cause shown in the St. Louis court of appeals against the affirmance of a judgment for want of prosecution, they should be preserved by bill of exceptions; otherwise they will not be examined in this court. *Estey v. Post*, 411.

7. ——: ——. Upon appeal from a judgment of the court of appeals affirming a judgment of the circuit court for want of prosecution, this court will inquire only whether there was a failure to prosecute. It will not go into the merits of the case. *Ib.*

8. ——: ——: DAMAGES. Ten per cent damages should be awarded by the appellate courts in those cases only where the record is examined and the appeal found to be without merit; not in cases of affirmance for want of prosecution. *Ib.*

9. CERTIORARI: AFFIDAVITS. On an appeal to the Supreme Court from the St. Louis court of appeals, the cause will be heard and determined, only upon precisely the same record as that which was before the court of appeals; and no regard will be paid to any amended record brought by *certiorari* directly to the Supreme Court from the trial court, nor to any affidavits as to the evidence upon the trial in such court. *Eaton v. The County of St. Charles*, 492.

10. WEIGHT OF EVIDENCE. Where there is substantial evidence to support a finding, appellate courts will not inquire as to its weight *Hodges v. Black*, 537.

11. A DEFENSE CANNOT BE SET UP for the first time in the appellate court. *St. Louis Brokerage Company v. Bagnell*, 554.

12. AFFIDAVITS FILED ON APPEAL. In the Supreme Court certain affidavits in relation to a rule of the trial court as to putting cases at the foot of the docket, were filed with the briefs of counsel. *Held*, that they could not be considered. *The State v. Underwood*, 630.

13. JUDGMENT NUNC PRO TUNC: PRESUMPTION: ORDER REVIEWABLE ON APPEAL. The presumption is, that a judgment entered *nunc pro tunc* at a subsequent term was based upon competent evidence. But where the facts appear, the action of the court may be reviewed on appeal. *Belkin v. Rhodes*, 643.

14. VERDICT: WEIGHT OF EVIDENCE: PRACTICE IN SUPREME COURT. In a case submitted to the jury under proper instructions this court never disturbs the judgment on the ground that the verdict is against the weight of evidence. *Roach v. Colbern*, 653.

15. REMITTITUR. The plaintiff in an action for malicious prosecution recovered upon all the counts of his petition. On appeal this court ordered the judgment reversed on the ground that he was not entitled to recover on one of them. The plaintiff then offered to remit the damages recovered on that count, which was allowed, and the judgment thereupon affirmed. *Sharpe v. Johnston*, 660.

## PRESUMPTIONS.

IDENTITY OF NAMES. Identity of names with an *alias* added is sufficient to raise a presumption of identity of persons. *The State v. Kelsoe*, 505.

——— OF CARE IN USE OF FIRE. See Palmer v. The Missouri Pacific Rail way Company, 217.

——— IN FAVOR OF JUDGMENT BELOW. See Appleby v. Brock, 314; Belkin v. Rhodes, 643.

## PRINCIPAL AND AGENT.

FOREIGN COMPANIES: LIENS: NOTICE TO STATION AGENTS. The station agents of a foreign railroad company operating a railroad in this State are the representatives of the company in such a sense that service of notice upon them, of claims for work and labor done or materials furnished upon the road, is service upon the company within the meaning of the statute providing the mode of obtaining and enforcing liens against railroads. R. S. 1879, §§ 3200 to 3216. *Morgan v. The Chicago & Alton Railroad Company*, 161.

## PRINCIPAL AND SURETY.

1. NOTICE TO SUE. A surety cannot base a claim to be released from his obligation on a verbal notice to the creditor to proceed against the principal debtor. To be available the notice must be in writing. *Petty v. Douglass*, 70.

2. ———: EXTENSION OF TIME. Part payment of a note after maturity is no valid consideration for an extension of time. *Ib.*

3. THE OBJECTION THAT A DEMAND was not made on the executor before the issuance of execution against him, cannot be made in a proceeding on a *scire facias* against his sureties. *Newton v. Cox*, 352.

4. ACTION AGAINST SURETIES: PLEADING. In an action against the sureties in a bond conditioned to secure the faithful performance of a building covenant contained in a lease, averments in the petition of breaches of other covenants of the lease are properly stricken out. *Shelton v. Durham*, 434

OBLIGATION OF SURETY STRICTLY CONSTRUED. See City of Harrisonville v. Porter, 358.

REMEDY AGAINST SURETIES OF DECEASED ADMINISTRATOR. See Babb v. Ellis, 459.

## PROCESS.

PUBLICATION AGAINST PARTIES UNKNOWN. See The State ex rel. Petts v. Staley, 158.

NOTICE TO STATION AGENT, UNDER THE RAILROAD LIEN LAW. See Morgan v. Chicago & Alton Railroad Company, 161.

PRINTER'S CERTIFICATE TO PUBLICATION OF DELINQUENT TAX LIST. See Raley v. Guinn, 263.

## PROMISSORY NOTE.

1. AS AFFECTED BY COLLATERAL AGREEMENT. A writing which has every element of a promissory note does not lose its character as such, by reason of a collateral agreement appended to it not inconsistent with the contract in the note. *Ewing v. Clark*, 545.

2. BURDEN OF PROOF. The holder of a note has a right to sue on it, and the burden is on the defendant to show a want of consideration. *Ib*

3. AGREEMENT AS TO PAYMENT. The note being an unconditional promise to pay a certain sum of money, it is incompetent for the defendant to show a prior or contemporary agreement that if he would execute the note and make a part payment on it at the same time, he should incur no further liability on the note. *Ib.*

4. ONE WHO SIGNS A NOTE after its execution makes himself absolutely liable to pay the amount to an innocent holder. *Ib.*

## PUBLICATION.

SERVICE BY, ON UNKNOWN PARTIES. See State ex rel Petts v. Staley, 158.

## PURCHASER WITHOUT NOTICE.

NOT EFFECTED BY JUDGMENT NUNC PRO TUNC. See McClannahan v. Smith, 428.

## QUESTIONS OF LAW AND FACT.

1. THE trial court having directed a verdict for defendant, this court

reverses the judgment, holding that there was evidence given on the part of the plaintiff which should have been submitted to the jury. *Smith v. Stokes*, 178.

2. In a prosecution for obtaining money by means of a bogus bond, it is error for the court not to submit to the jury the question whether the act charged was done with intent to cheat and defraud. *The State v. Norton*, 180.

3. An instruction offered in such an action, *Held*, to have been properly refused because among other things, it submitted a question of law to the jury in requiring them to find what was due diligence. *Turner v. The St. Louis & San Francisco Railroad Company*, 261.

4. Proximate cause: question of law. Where the facts are undisputed, the question whether a certain act is the proximate cause of an injury, is one of law for the court. *Henry v. The St. Louis, Kansas City & Northern Railway Company*, 288.

## RAILROADS.

1. Railroad: rate of speed. Aside from statutory or municipal regulation, no rate of speed at which a railroad train may be run is negligence *per se*. *Powell v. The Missouri Pacific Railway Company*, 80.

2. Crossing the track. One who goes upon a railroad track is bound to look and listen for approaching trains; and if he fails to do so he cannot complain of any injury he may sustain, though the company may be remiss in giving the customary signals. *Lenix v. The Missouri Pacific Railway Company*, 86.

3. Foreign companies: liens: notice to station agents. The station agents of a foreign railroad company operating a railroad in this State are the representatives of the company in such a sense that service of notice upon them, of claims for work and labor done or materials furnished upon the road, is service upon the company within the meaning of the statute providing the mode of obtaining and enforcing liens against railroads. R. S. 1879, §§ 3200 to 3216. *Morgan v. The Chicago & Alton Railroad Company*, 161.

4. Lien: enforcement in case of several owners. It is not essential that all the companies that may be interested in a railroad should be made parties to a proceeding to enforce a lien for work and labor or materials; but if any are omitted their interest will not be affected. *Ib.*

5. Personal liability in favor of sub-contractors, laborers, etc. The provision of section 787, Revised Statutes 1879, requiring sub-contractors, laborers, etc., to give notice within twenty days after the performance of the labor or delivery of the material for which claim is made against a railroad company, does not relate to the enforcement of a lien, but the establishment of a personal liability against the company. *Ib.*

6. ———. Unless the company is notified within twenty days as provided by that section, a personal judgment against it in a suit brought thereunder, will be erroneous. *Ib.*

7. PLAINTIFF in ejectment cannot recover unless the legal title was vested in him at the time of bringing the suit. *Dunlap v. Henry*, 106.

8. ESCAPE OF FIRE: PRESUMPTION. There is no legal presumption that a railroad company, while in the exercise of its lawful right to run its locomotives and trains over its road and to use fire in so doing, will not permit fire to escape from them. *Palmer v. The Missouri Pacific Railway Company*, 217.

9. ———. The fact that a railroad company uses good machinery and the most approved appliances to prevent the escape of fire, and has careful and competent men in charge thereof, will not, in case fire does escape, of itself rebut the *prima facie* inference of negligence or exempt the company from liability for damages caused thereby. *Ib.*

10. ———: CONTRIBUTORY NEGLIGENCE. The fact that a farmer permits dry grass and other combustible matter to remain on his land, does not constitute contributory negligence on his part so as to prevent him from recovering against a railroad company for the destruction of property there situate, caused by fire escaping from a passing train and driven by a high wind through similar combustible matter on the company's right of way and on an intervening farm. *Ib.*

11. ———: DUTY TO PROVIDE AGAINST HIGH WINDS. Railroad companies must use reasonable precautions to prevent fire from being carried from their locomotives by such winds as are usual and ordinary at the season and the place, and are only relieved from making provision against extraordinary and unusual winds. *Ib.*

12. A judgment for plaintiff in an action for damage to cattle cannot stand without proof that plaintiff was the owner of the cattle. *Turner v. The St. Louis & San Francisco Railroad Company*, 261.

13. DAMAGE TO CATTLE. In an action under section 5 of the Damage Act, or at common law, it is error to give an instruction based on section 43 of the Railroad Law. *Ib.*

14. ———. In a common law action against a railroad company for injury to cattle, the plaintiff cannot recover without showing negligence on the part of defendant. *Ib.*

15. CARRIER OF PASSENGERS—NOT AN INSURER. A carrier of passengers is not an insurer but is held only to the utmost care and diligence of a cautious person. An instruction, therefore, that a carrier was liable for an injury to a passenger from a defect in his vehicle unless he had used the "greatest possible care and diligence that was necessary," is erroneous. *Gilson v. The Jackson County Horse Railway Company*, 282.

16. REMOTE CAUSE OF INJURY. A passenger who was told by a brakeman to change cars at a way station, entered another car but was told by one of the company's servants there that he could not remain inside the car as the train was not ready. The passenger, after remaining a short time on the platform of the car, alighted, and while standing on a track near that on which the car was, was injured by another train. *Held*, that his expulsion from the car was not the proximate cause of the injury. *Henry v. St. Louis, Kansas City & Northern Railway Company*, 288.

17. NEGLIGENCE, IRRELEVANT WHEN. A passenger being on the company's track under circumstances which did not create any duty on its part towards him, the fact that the company was guilty of negligence short of willful, was irrelevant. *Ib.*

18. PROXIMATE CAUSE: QUESTION OF LAW. Where the facts are undisputed, the question whether a certain act is the proximate cause of an injury, is one of law for the court. *Ib.*

19. ACTION FOR KILLING STOCK. A statement filed in a justice's court in an action against a railroad company for killing stock, to be sufficient under the 43rd section of the Railroad Law, must aver that the killing did not occur within the limits of an incorporated town. *Schulte v. The St. Louis, Iron Mountain & Southern Railway Company*, 324.

20. ACTION FOR KILLING STOCK: COMMON LAW ACTION: EVIDENCE. A statement of claim against a railroad company for killing the plaintiff's cow, set out that the defendant "so carelessly and negligently, rapidly and heedlessly ran and managed its said locomotive engine and cars without ringing its bell or using its steam-cock, or giving any other alarm, that the same ran against and over" the cow. *Held*, that this was a statement of a cause of action at common law and not under the statute, and that evidence to show the speed of the train, and when and at what place the whistle was sounded, was admissible. *Mapes v. The Chicago, Rock Island & Pacific Railway Company*, 367.

21. KILLING STOCK: PLEADING AND EVIDENCE. The plaintiff's statement charged the defendant with negligently and carelessly running over and killing plaintiff's cow by failing to ring the bell or sound the whistle at a public crossing, "and by otherwise negligently and carelessly operating its locomotive and cars." *Held*, that evidence of other acts of negligence besides failure to ring the bell and sound the whistle was properly admitted under this statement. *Edwards v. The Chicago, Rock Island & Pacific Railway Company*, 399.

22. KILLING STOCK: EVIDENCE. In an action for damages against a railroad company for killing stock in consequence of a failure to ring the bell or sound the whistle as required by statute, it is essential to recovery to show that the damages resulted from such failure. But the connection between the injury and the company's default may be inferred from the circumstances of the particular case. *Alexander v. The Hannibal & St. Joseph Railroad Company*, 494.

23. WHERE the record fails to show that the plaintiff was the owner or was in possession of the animal at the time of the killing, a judgment for the plaintiff must be reversed. *Ib.*

24. CARRIER OF LIVE STOCK: SPECIAL CONTRACT. The liability of carriers of live stock may be limited by a special contract, whereby the shipper agrees that his claim for damages under the contract, if any, shall be made in writing to the general freight agent of the carrier within five days after the live stock shall have been unloaded or delivered at the point of destination. *Dawson v. The St. Louis, Kansas City & Northern Railway Company*, 514.

25. PLEADING: SPECIAL PLEA: GENERAL DENIAL. In an action against a railroad company for the death of a passenger, the negligence alleged was the want of care in the servants of the company and defects in its road. The defendant denied all the allegations of the petition, and also filed a special plea alleging that the road was well constructed, the servants skillful and careful, but that the casualty was caused by an extraordinary rain storm. *Held*, that this matter could be shown under the general denial, and the special plea was properly stricken out. *Ellet v. The St. Louis, Kansas City & Northern Railway Company*, 518.

26. STATUTE REQUIRING DITCHES: EXTRAORDINARY STORMS. The statute requiring railroad companies to construct ditches and drains along the sides of their road-beds does not require them to provide against floods which are extraordinary and unprecedented. *Ib.*

27. PLEADING: SPECIFIC ALLEGATIONS: NEGLIGENCE. A petition charging negligence in a railroad company in conducting and running its train, where the negligence complained of is that of the engineer in managing it at the time of the casualty, is sufficiently specific. *Ib.*

28. DEFECT IN TRACK CAUSED BY EXTRAORDINARY STORMS: NEGLIGENCE. The overturning of a railroad train was caused by the sudden weakening of the track by an extraordinary flood. There was no defect in any car in the train, or in the track, or in the ditches or drains at the side of the road-bed. In an action for the death of a passenger caused thereby, *Held*, that the liability of the company depended upon the question whether or not the engineer of the train, on approaching the place where the track had been so weakened by the flood, had reason to believe from the height of the water in the ditches, etc., that it had previously risen so as to soften the road-bed and render the track unsafe. If he had, it was his duty to have tested the track before taking his train over it, and this omission would amount to negligence for which the company would be liable. *Ib.*

29. FIRE ESCAPING FROM LOCOMOTIVE: SUFFICIENCY OF EVIDENCE. Witnesses who were a quarter of a mile away from a railroad track at the time a train passed, about fifteen minutes afterward observed fire, and going to the place found it was burning on the railroad right of way and also in the plaintiff's field about fifteen yards west of the right of way. The wind was blowing from the east; and the right of way was foul with very dry grass and weeds. There was no fire on the east side of the track, and none had been observed before the passage of the train. *Held*, that this was evidence enough to submit to the jury on the question whether the fire escaped from the locomotive that drew the train. *Redmond v. The Chicago, Rock Island & Pacific Railway Company*, 550.

30. RAILROAD COMPANY KILLING STOCK: JUSTICE'S COURT: PLEADING. In an action against a railroad for killing stock commenced in a justice court, the statement filed alleged the killing of a cow "at a point on said railway where said road was not inclosed by a fence as required by law." *Held*, that it was insufficient as a cause of action under section 43 of the railroad corporation act, (R. S., § 809,) because it failed to allege that the cow got on the track and was killed in consequence of the failure of the defendant to erect fences as required by law. *Johnson v. The St. Louis, Kansas City & Northern Railway Company*, 553.

31. ——: ACTION AT COMMON LAW AND UNDER DAMAGE ACT. Said statement showed no action at common law—no negligence being alleged; nor did it show an action under the 5th section of the damage act, (R. S., § 2124). *Ib.*

32. DITCHES: PLEADING. A petition in an action against a railroad company for flooding the plaintiff's land stated that defendant "failed to keep its road in such condition as to prevent injury to plaintiff; but negligently and carelessly failed to make and keep open proper ditches for the purpose of leading the water off of plaintiff's land." There was no averment of any fact showing that defendant was under any legal obligation to maintain ditches. *Held*, that for want of such averment the petition was fatally defective. *Field v. The Chicago, Rock Island & Pacific Railway Company*, 614.

33. RAILROADS: FENCES AT CROSSINGS: HIGHWAY DE FACTO. The statutory rule that railroads are not required to fence their roads at public crossings, extends to highways *de facto* as well as highways *de jure*. *Luckie v. The Chicago & Alton Railroad Company*, 636.

LIABILITY FOR OBSTRUCTING ROADS. See Kansas City, St. Louis & Chicago Railroad Company v. Farrell, 183.

## RES JUDICATA.

1. WHERE the defendant pleaded *res judicata*, and the plaintiff, in order to avoid the effect of the plea, insisted that the facts relied upon by him for recovery were not sufficiently pleaded, and, therefore, were not admissible in defense of the former suit, but it appeared that that question was raised in that suit and was decided in favor of the admission of the evidence and it was admitted; *Held*, that the plaintiff could not raise it again. *Chouteau v. Gibson*, 38.

2. THE doctrine of *res judicata* applies as well to judgments of courts of last resort as to those of *nisi prius* courts. If the same subject matter comes in question in a second action before a court of last resort, it is bound by its own former decision. *Ib.*

3. To sustain a plea of *res judicata*, there must be evidence to show that the matters in issue and decided in the first suit are the same as those presented for determination in the second. *Spurlock v. The Missouri Pacific Railway Company*, 67.

## ROADS.

1. OBSTRUCTION OF ROAD: DAMAGES. Where adjoining proprietors by agreement closed a dedicated highway, and in place of it opened a road upon another site; *Held*, that whether the road so opened was a public highway or a private right of way, they and those claiming under them had such an interest in it as entitled them to recover damages from a railroad company crossing it in such a manner as to obstruct its free use. *The Kansas City, St. Louis & Chicago Railroad Company v. Farrell*, 183.

2. OBSTRUCTING PUBLIC ROAD: EVIDENCE. R. was indicted for willfully and unlawfully obstructing a public road. The order of the county court establishing the road in question, proof that the same had been used as a public road, and that R. had built a fence across it were shown in evidence. *Held*, sufficient to sustain a conviction. *The State v. Ramsey*, 398.

3. OBSTRUCTION OF ROADS: EVIDENCE. In an action for the obstruction of a private road defendants offered in evidence a notice served upon them by plaintiff in which the road was stated to be a public road. *Held*, that the notice ought to have been received, as showing that at the time it was given plaintiff esteemed the road a public and not a private road. *Turner v. Williams*, 617.

4. RAILROADS: FENCES AT CROSSINGS: HIGHWAY DE FACTO. The statutory rule that railroads are not required to fence their roads at public crossings, extends to highways *de facto* as well as highways *de jure*. *Luckie v. The Chicago & Alton Railroad Company*, 636.

## ST. LOUIS.

1. TAXATION: POWERS OF CITY OF ST. LOUIS. The city of St. Louis was empowered by the constitution of 1875 to make provision in its charter for the levy of taxes by its municipal assembly, upon such subjects and in such manner as would not be in contravention of the constitution and laws of the State. *The City of St. Louis v. Bircher*, 431.

2. THE "MUNICIPAL CORPORATIONS" mentioned in section 1, article 10 of the constitution, are those which derive their existence from legislative enactment. The city of St. Louis is not included in the term. *Ib.*

3. THE ORDINANCE OF THE CITY OF ST. LOUIS licensing hotels and boarding houses is valid. *St. Louis v. Bircher*, 7 Mo. App. 169, affirmed. *Ib.*

4. CHARTER OF ST. LOUIS: STREET OPENINGS: ASSESSMENT OF BENEFITS: DUE PROCESS OF LAW: SUIT ON SPECIAL TAX-BILLS. The article of the charter of the city of St. Louis in relation to the opening of streets, provides for the giving of notice of the proceeding to all persons whose lands are to be taken for a street, and authorizes the commissioners appointed to assess damages and benefits, to make assessments of benefits against the owners of all property which in their opinion will

be specially benefited by the opening, not limiting them to those who have been made parties to and notified of the proceeding. It further provides that the sums so assessed shall be a lien on the property benefited and shall be collected as provided by ordinance. The foregoing proceedings, under the charter, are had and conducted in the St. Louis circuit court. An ordinance provides for the issuing of special tax-bills for these sums and makes it the duty of the city collector by advertisement in a newspaper for ten consecutive days to notify all parties interested by name that he has these bills in his hands for collection, and that they may be paid at any time during sixty days without interest or costs, and that all bills remaining unpaid at the expiration of that period, will be enforced by legal proceedings; and further provides that after the expiration of the sixty days the city counselor shall proceed to collect all bills remaining unpaid by suit in the circuit court. No provision of either charter or ordinance undertakes to make the special tax-bills a lien upon the land; nor is there any declaration that said assessment or tax-bill shall be, even *prima facie*, much less conclusive evidence, of the truth of the facts upon which they are based. *Held*, that in this method of procedure there is nothing which a person who had no notice of the original proceeding, but has been assessed benefits, can object to as violating the constitutional prohibition against taking property without due process of law. He has his day in court when summoned to answer the suit on the tax-bill, and in this suit may make any defense he may have, or which he could have presented to the original proceeding had he been made a party and been notified thereof.

But per NORTON, J. The right of defense is limited to showing that the law authorizing the assessment has not been complied with in some essential particular. The amount cannot be disputed. *The City of St. Louis v. Richeson*, 470.

CITY REGISTER'S DUTY IN MAKING OUT ELECTION RETURNS. See The State ex rel. Broadhead v. Berg, 136.

## SALES.

1. FALSE REPRESENTATIONS: SCIENTER. In legal effect a false representation made by a party as of his own knowledge, and not as a mere matter of opinion or general assertion, about a matter of which he has no knowledge whatever, is the same as the statement of a known falsehood, and will constitute a *scienter*. *Caldwell v. Henry*, 254.

2. ——— OF VENDOR: NEGLIGENCE OF VENDEE. The fact that the vendee omits to examine the property or to make inquiries of persons to whom he is referred by the vendor before buying, will not relieve the latter of liability for false representations made by him concerning it in the course of the negotiation. *Ib.*

3. SALE OF BANK STOCK: REPRESENTATIONS BY BANK OFFICER AS TO CONDITION OF THE BANK. A person buying stock of a bank from the bank is entitled to rely upon assurances of an officer of the bank as to its financial condition; and if already a stockholder is not bound to avail himself of his right of examining the books of the bank. *The Union National Bank v. Hunt*, 439.

4. ——— : ———. A representation by a bank officer that stock of his bank is worth $100 per share is a mere expression of opinion or commendation of the stock, and if it turns out to be false a note taken by him for the price of the stock will not thereby be avoided though it was relied on by the purchaser, but it is otherwise with a representation that the bank is in a solvent condition and doing a good business. *Ib.*

5. FAILURE OF CONSIDERATION on the sale of an article, *e. g.*, that the article was worthless for the purpose, may be shown in an action for its price, though there has been no offer to return it and no notice of its worthlessness. *Compton v. Parsons*, 455.

6. SALE ON TRIAL: VENDOR'S REMEDIES ON CONTRACT. Plaintiff sold defendant a machine with warranty, to be paid for if upon trial it proved to be as warranted. After trying it, defendant declined to take it and so notified plaintiff, but continued to use it for some days. He then offered to return it to plaintiff, but plaintiff refused to receive it, and thereupon defendant left it on the sidewalk in front of plaintiff's store-room. *Held*, that these facts would not sustain an action for conversion. If the machine was really what it was warranted to be, plaintiff's remedy was by action on the contract for the purchase-price; if not he could still have recovered for the use of the machine after defendant gave notice that he would not take it. *McCormack v. Gilliland*, 655.

## SHERIFF'S DEEDS.

1. MUST FOLLOW THE EXECUTION. If a sheriff's deed conforms to the execution, in reciting the names of the parties and the dates and amounts of the judgment, it is sufficient in that particular, and if there is a variance between the execution and judgment, and the variance is such as to make the execution erroneous only and not void, the deed will pass the title of the execution debtor. *Davis v. Kline*, 310.

2. VARIANCES AS TO NAMES. Certain variances between the execution and the judgment in respect to the names of parties; *Held*, not to make the execution void. *Ib.*

3. VARIANCES AS TO DATES. Two executions and a sheriff's deed thereon recited judgments of the year 1875, while the judgment rolls showed that they were rendered in 1876. There being other evidence to show that the executions were in fact issued on these judgments; *Held*, that this variance was but a clerical misprision and would not invalidate the execution. *Ib.*

## SIGNIFICATION OF WORDS.

"FAILS TO SUE." See McNamara v. Slavens, 329.

"PROPER AUTHORITIES OF THE CITY." See The Union Depot Company v. The City of St Louis, 393.

## SLANDER.

1. PLEA IN MITIGATION. A plea in mitigation of damages in an action for slander, should not contain an averment of the truth of the alleged slanderous words. *Coe v. Griggs*, 619

2. JUSTIFICATION: EVIDENCE. Where a defendant in an action for slander pleads in justification, it is not error to exclude evidence that since the commencement of the suit he has repeated the alleged slanderous words. *Ib.*

3. STATUTE OF FRAUDS: PAROL EVIDENCE. In an action for slander the petition charged that defendant said of plaintiff, "You stole my rock." Defendant pleaded in mitigation of damages that plaintiff had let a quarry to one M. who had quarried the rock and set it apart for defendant and had been paid for it by defendant, and that plaintiff, though he knew this, had taken the rock and converted it to his own use. At the trial parol evidence was admitted of the letting of the quarry to M. *Held*, no error. *Ib.*

4. To sustain an action for slander it is necessary to prove the exact language alleged to have been used by defendant, or enough of the exact language to constitute the charge. It is not sufficient to prove different words of similar import or equivalent in meaning. *Ib.*

## SPECIAL TAX BILLS.

FOR BENEFITS FROM STREET OPENING. See The City of St. Louis v. Richeson, 470.

## STATUTES.

1. WHERE a statute uses disjunctive language in defining an offense, an indictment under it may be drawn in the conjunctive. *The State v. Pittman*, 58; *The State v. Bregard*, 322.

2. A BOND IS NOT INVALID as a statutory bond merely because it does not follow the exact words of the statute. *Newton v. Cox*, 352.

3. FOREIGN STATUTE ADOPTED HERE: CONSTRUCTION. Where the statute of another state or country is enacted here, the courts of this State will place the same construction on it as had been given to it at the time of its adoption here by the courts of the foreign state, or country. *Skrainka v. Allen*, 384.

——— NOT NECESSARY TO AUTHORIZE COURTS TO CORRECT THEIR OWN ERRORS. See McCabe v. Lewis, 296.

MUNICIPAL ORDINANCES. See Quinette v. The City of St. Louis, 402.

STATUTORY SALE: DEED UNDER. See Exendine v. Morris, 416.

## STATUTES CONSTRUED.

### REVISED STATUTES OF 1879.

Section 235, see page 353.
Section 236, see page 353.
Section 252, see page 353.
Section 737, see page 391.
Section 787, see page 161.
Section 790, see page 174.
Section 809, see pages 261, 553.
Section 1252, see page 101.
Section 1264, see page 109.
Section 1550, see page 318.
Section 1561, see page 181.
Section 1653, see page 336.
Section 1659, see page 253.
Section 1666, see page 355.
Section 1841, see page 638.
Section 1859, see page 564.
Section 1884, see page 632.
Section 1910, see page 630.
Section 1918, see pages 317, 351.
Section 1930, see page 350.
Section 1986, see page 672.
Section 2121, see page 325.
Section 2122, see page 325.
Section 2123, see page 325.
Section 2124, see pages 261, 553
Section 2130, see page 234.
Section 2133, see page 229.
Section 2150, see pages 229.
Section 2159, see page 234.
Section 2257, see pages 226, 344, 428.
Section 2260, see pages 226, 428.
Section 2261, see page 226.
Section 2335, see page 378.
Section 2336, see page 378.
Section 2392, see page
Section 2620, see page 236.
Section 2723, see page 70.
Section 2837, see page 317.
Section 2858, see page 18.
Section 3052, see page 456.
Section 3059, see page 457.
Section 3200 to 3216, see page 161.
Section 3489, see page 176.
Section 3499, see page 159.
Section 3505, see page 173.
Section 3558, see page 630
Section 3565, see page 438
Section 3636, see page 96.
Section 3705, see pages 374, 608.
Section 3713, see page 370.
Section 3717, see page 370.
Section 3718, see page 370.
Section 3989, see page 415.
Section 4017, see page 446.
Section 4027, see page 229.
Section 4821, see page 244.
Section 5497, see page 149.
Section 5502, see page 150.
Section 5513, see page 152.
Section 5653, see page 423.
Section 6047, see page 594.
Section 6053, see page 604.
Section 6836, see page 158.
Section 6837, see page 159.
Section 6838, see pages 158, 559.
Section 6853, see page 559.
Section 6964, see page 398.

### WAGNER'S STATUTES 1872.

Page 75, § 35, see page 306.
Page 105, § 29, see page 206.
Page 109, § 11, see page 206.
Page 119, § 1, see page 205.
Page 122, § 8, see page 206.
Page 122, § 12, see page 512.
Page 124, § 25, see page 512.
Page 125, § 7, see page 271
Page 291, § 13, see page 384.
Page 310, § 38, see page 368.
Page 310, § 43, see pages 321, 369.
Page 315d, § 67 see page 393.
Page 345, § 22, see page 429.
Page 500, § 9, see page 216.
Page 607, § 23, see page 429.
Page 618, § 1,see page 429.
Page 620, § 6, see page 676.
Page 621, § 7, see page 676.
Page 622, § 8, see page 676.
Page 815, § 16, see page 18.
Page 1020, § 42, see page 513.
Page 1097, § 15, see page 102.
Page 1193, § 166, see page 273.
Page 1196, § 182, see page 275
Page 1196, § 183, see page 275.
Page 1197, § 184, see page 276.
Page 1197, § 185, see pages 271, 276.
Page 1198, § 190, see page 276.
Page 1199, § 192, see pages 134, 276
Page 1200, § 195, see page 129.
Page 1206, § 219, see pages 134, 269.
Page 1212, § 241, see page 270.

### GENERAL STATUTES, 1865.

Page 129, § 124, see page 106.
Page 375, § 11, see page 48.
Page 487, § 68, see page 459.
Page 609 § 12, see page 48.
Page 659 § 13, see page 47.

### REVISED STATUTES, 1855.

Page 372, § 14, see page 390.
Page 891, § 6, see page 14.
Page 983, § 1, see page 61.
Page 983, § 16, see page 61.
Page 991, § 1, see page 62.
Page 991, § 4, see page 62.

### REVISED STATUTES, 1845.

Page 87, § 31, see page 679.
Page 88, § 34, see page 680.

### ACTS OF 1882

Page 1, see page 137.

### ACTS OF 1881

Page 55 § 21, see page 143.
Page 56 § 22, see page 143.
Page 56 § 25, see page 149.

### ACTS OF 1877.

Page 11, § 2, see page 153.
Page 275, § 1, see page 594.
Page 355, § 6, see page 55.
Page 357, § 1, see page 54.

### ACTS OF 1875.

Page 130, § 1, see page 641.
Page 193, § 3, see page 236.

ACTS OF 1874.

Page 327, § 5, see page 236.

ACTS OF 1873.

Page 51, § 1, see page 492.

ACTS OF 1872.

Page 127, § 211, see page 135.
Page 373, § 44, see page 360.

CTS OF 1870.

Page 46, § 1, see page 346.

ACTS OF 1869.

Page 63, § 1, see page 492.

ACTS OF 1868.

Page 3, § 1, see page 346,

## STATUTES OF FRAUDS.

1. PROMISE FOR BENEFIT OF PROMISOR. Defendant promised plaintiff that if he would attend a sale about to be made under a deed of trust given to secure the note of a third person, held by plaintiff, and would buy in the property for defendant, he would pay plaintiff the amount of the note. *Held*, that the promise was not within the statute of frauds, and did not need to be in writing. *Hale v. Stuart*, 20.

2. STATUTE OF FRAUDS: PAROL EVIDENCE. In an action for slander the petition charged that defendant said of plaintiff, "You stole my rock." Defendant pleaded in mitigation of damages that plaintiff had let a quarry to one M. who had quarried the rock and set it apart for defendant and had been paid for it by defendant, and that plaintiff, though he knew this, had taken it and converted it to his own use. At the trial parol evidence was admitted of the letting of the quarry to M. *Held*, no error. *Coe v. Griggs*, 619.

## SWAMP LANDS.

PROCEEDINGS TO RECLAIM SWAMP LANDS. Notice of an application to the judges of a county court for the reclamation of swamp lands under the act approved March 3rd, 1869, (Sess. Acts, p. 63,) and the amendatory act approved February 15th, 1873, (Sess. Acts, p. 51,) is a jurisdictional fact, without proof of which all subsequent proceedings will be *coram non judice*. *Eaton v. The County of St. Charles*, 492.

See Jasper County v. Tavis, 13.

## TAXES.

1. TAX DEEDS. Under the Revenue Act of 1865, (Gen. St. 1865, p. 129, § 124,) tax deeds were required to be acknowledged before the county clerk. If acknowledged before a notary public they were void. *Dunlap v. Henry*, 106.

2. TAX SALE. It was essential to the validity of a tax sale under the Revenue Act of 1872, that the "special execution record" should include a copy of the judgment and order of sale of the county court certified by the clerk under the seal of the court. See Wag. Stat., p. 1200, § 195. *Ewart v. Davis*, 129.

3. TAX DEED PRIMA FACIE VALID. Under the foregoing act, a tax deed regular upon its face was *prima facie*, and not conclusive, evidence of compliance with the requirements of the act. To impeach it any matter might be shown which, aside from mere omissions or irregularities, went to establish a substantial non-compliance with the act, as *ex. gr.*, that no judgment, or valid judgment, was ever rendered against the land, or that no special execution was ever delivered to the collector. Or if it was not liable to objection on any such grounds as these, then it might be shown either that the land was not subject to taxation, or that the taxes had been paid, or that the land had been redeemed since the sale. *Ib.*

4. BACK TAXES: JUSTICE'S JURISDICTION. Under the present law justices of the peace have jurisdiction of suits for the collection of back taxes, and if the summons be returned *non est*, may order publication to be made. R. S. 1879, §§ 6836, 6838. *The State ex rel. Petts v. Staley*, 158.

2. ——: SUITS AGAINST PARTIES UNKNOWN: SERVICE BY PUBLICATION. Where persons unknown are made parties defendant to a suit for the collection of back taxes, the plaintiff must allege in his petition under oath that there are persons interested whose names he cannot insert because they are unknown to him, and he must describe their interests and how derived, so far as his knowledge extends, and the order of publication must recite all these allegations. Failure to observe these requirements will invalidate the proceedings. *Ib.*

6. TAX DEEDS: THEIR CONCLUSIVENESS. The Revenue Act of 1872 made tax deeds conclusive evidence that everything had been done, the omission of which would have been nothing more than an irregularity in procedure, and *prima facie* evidence of everything else. Wag. Stat., p. 1199, § 193; p. 1206, § 219; p. 1212, § 241. *Raley v. Guinn*, 263.

7. ——: ——: EFFECT OF JUDGMENT ON DELINQUENT LIST. Where a judgment of the county court upon the delinquent tax list expressly avers that the collector has given due notice, a tax deed founded upon the judgment cannot be attacked by showing that the printer failed to affix to the copy of the newspaper containing the list, which, in compliance with the statute, was filed in court at the time the judgment was rendered, his certificate under oath showing the due publication thereof.

But per NORTON and RAY, JJ., dissenting: Without the printer's certificate the county court had no jurisdiction to enter judgment, and the judgment is void. *Ib.*

8. ——: ——: ——: OMISSION OF DOLLAR-MARK. Where the published delinquent list in a column entitled "Tax, interest and cost" contained the figures "5,68" opposite the description of the land, but no dollar character, or other thing to indicate the meaning of the figures; *Held*, that this would not invalidate the tax deed; especially in a case where the judgment recited that due notice of the proceeding had been given before judgment. *Ib.*

9. ———: COUNTY LEVY: DUTY OF COURT AS TO ENTERING AMOUNT ON RECORD. The act did not require the county court, before levying a county tax to ascertain and enter of record the sum necessary for county purposes; but if it had, failure of the court to have the entry made would not invalidate a tax deed. *Ib.*

10. ———: COUNTY COURT JUDGMENT: PRESIDING JUSTICE'S SIGNATURE. The fact that the presiding justice of the county court adds to his signature to the judgment upon the delinquent list, the word "President" instead of his proper official designation, will not invalidate the deed. *Ib.*

11. ———: OFFER TO PAY TAXES BEFORE SALE. A tax deed cannot be defeated by showing that before the advertisement or sale of the land the owner went to the collector's office to pay the taxes and was there told there were none against it. *Ib.*

12. EXECUTION AGAINST SEVERAL LOTS. Under the revenue act of 1877 every parcel of land is liable for its own taxes, and no parcel is liable for the taxes of any other. Where, therefore, an execution ran against several lots, and at the sale a portion of them brought enough to pay the taxes on all; *Held*, that this did not make it the duty of the sheriff to stop the sale. He had no power to apply any part of the proceeds of the lots sold to the payment of the taxes due on the remainder and it made no difference that all the lots belonged to the same owners. *The State ex rel. Rosenblatt v. Sargeant*, 557.

13. ———. There is no question of the constitutionality of that provision of the revenue act of 1877 which authorizes the enforcement of a lien against the land without any personal judgment against the owner. *Ib.*

REIMBURSEMENT FOR TAXES PAID BY PURCHASER AT VOID ADMINISTRATOR'S SALE. See Schafer v. Causey, 365.

POWER OF CITY OF ST. LOUIS TO LEVY. See The City of St. Louis v. Bircher, 431.

## TRUSTS AND TRUSTEES.

1. DEVISE OF TRUST PROPERTY. A deed in trust for the use of a married woman made it the duty of the trustee to convey the premises to such person as she might at any time designate in writing. By her last will she made her husband her residuary legatee. The trust property had never been conveyed in her life-time and was not otherwise disposed of by the will. After her death the trustee conveyed to her husband. *Held*, that this conveyance was a nullity, but the title passed by virtue of .he residuary clause of the will. *Bradstreet v. Kinsella*, 63.

2. TRUSTEE OF EXPRESS TRUST, MUST ACT FOR THE CESTUI QUE TRUST. One who holds a demand partly in his own right and partly in the right and for the benefit of another, is as to the other a trustee of an

express trust, and cannot, by assigning his own interest, split up the cause of action, and thus deprive his *cestui que trust* of the right to have him enforce his rights by suit. *Richardson v. Laclede County*, 68.

3. TRUST FUNDS: MINGLING WITH FUNDS OF TRUSTEE. When the subject matter of a trust has been turned into money or was originally money, and the means of ascertainment fail, owing to its being mixed and confounded with the mass of the estate of the trustee, the right to follow the property ceases, because that right depends on the power of identifying the original property through any change of its original forms. *Mills v. Post*, 426.

4. ———: CASE ADJUDGED. A petition for the enforcement of a trust against funds in the hands of an administrator, alleged that the intestate, in his lifetime, received certain trust moneys which he deposited in bank in his own name as trustee, that he afterward took all of said moneys, except $159, and used and invested the same in his own business and mingled the same with his own estate, etc., and that at the time of his death there was in the hands of the intestate of said trust funds uninvested the said sum of $159, which the administrator was wrongfully withholding. On demurrer to the petition; *Held*, that there was nothing in the averments in reference to the $159 which would take that part of the fund out of the operation of the foregoing rule. *Ib.*

## VENDOR AND VENDEE.

1. PURCHASER OF EQUITABLE TITLE TO LAND. The purchaser of an equitable title to land takes it subject to all the equities between his vendor and the holder of the legal title as they exist at the time of his purchase. Thus, where a county sold swamp land on credit, and caused a certificate of purchase to be delivered to the purchaser specifying the terms of the sale, and providing that on compliance with these terms the purchaser should be entitled to a deed, and by a subsequent contract these terms were altered, but no change was made in the certificate; *Held*, that a subsequent purchaser from the county's vendee was bound by the altered terms. *Jasper County v. Tavis*, 13.

2. MARRIED WOMAN'S CONTRACT FOR REAL ESTATE. SUBSEQUENT PURCHASER WITH NOTICE. A vendor who has contracted in writing to convey land to a married woman, and has received part of the purchase money, is so far bound that he cannot rescind without tendering back the money; and one purchasing from him with notice of the contract will take subject to her equitable right, so that if the vendor afterward conveys to her, she may maintain an action against him for the title. *Neef v. Redmon*, 195.

3. FALSE REPRESENTATIONS: SCIENTER. In legal effect a false representation made by a party as of his own knowledge, and not as a mere matter of opinion or general assertion, about a matter of which he has no knowledge whatever, is the same as the statement of a known falsehood, and will constitute a *scienter*. *Caldwell v. Henry*, 254.

4. ——— OF VENDOR: NEGLIGENCE OF VENDEE. The fact that the vendee omits to examine the property or to make inquiries of persons to whom he is referred by the vendor before buying, will not relieve the latter of liability for false representations made by him concerning it in the course of the negotiation. *Ib.*

## VENUE.

1. IN CRIMINAL CASES. While it is necessary in criminal cases to prove the venue as laid in the indictment, it is not necessary that the evidence should be direct, express or positive. Circumstantial evidence may be sufficient *The State v. McGinnis*, 326.

2. ———. Where the venue of the crime is not shown by the record to have been proved, a judgment of conviction will not stand. *The State v. Babb*, 501.

3. ———. Where there is no evidence in the record that the venue of the crime was proved or the question of venue was submitted to the jury, a judgment of conviction will be reversed. *The State v. Inman*, 548.

4. CHANGE OF VENUE: EVIDENCE. An application for change of venue must be supported by legal and competent evidence. Affidavits cannot be used. But if the applicant offers to call in by-standers to testify orally, he should be permitted to do so. *The State v. Bohanan*, 562.

## WAIVER.

1. MOTION FILED IN TERM: TIME: CONSTRUCTION OF STATUTE. Section 3558, Revised Statutes, which provides that "motions in a cause filed in term shall be filed at least one day before they may be argued or determined," is for the protection of the adverse party to a motion, and when he does not claim the benefit of it, the party filing it cannot. *The State v. Underwood*, 630.

2. IRREGULARITY: DEFAULT: WAIVER. The name of one of several defendants did not appear in the petition when filed or the writ when issued, but was added before service. He did not appear and judgment was entered against him by default. *Held*, that the objection was waived. *Belkin v. Rhodes*, 643.

## WILLS.

1. DEVISE OF TRUST PROPERTY A deed in trust for the use of a married woman made it the duty of the trustee to convey the premises to such person as she might at any time designate in writing. By her last will she made her husband her residuary legatee. The trust property had never been conveyed in her lifetime, and was not otherwise disposed of by the will. After her death the trustee

conveyed to her husband. *Held*, that this conveyance was a nullity, but the title passed by virtue of the residuary clause of the will. *Bradstreet v. Kinsella*, 63.

2. PROBATE IN ANOTHER STATE. The probate of a will in another state is a judicial proceeding, to the record of which full faith and credit is to be given, when authenticated as required by the act of Congress: and it is not necessary to the admission of such will with the probate thereof in evidence that they shall have been recorded in this State. *Ib.*

3. PROBATE OF WILLS. The probate of a will relates to the death of the testator and confers title from that time. The fact, therefore, that a will under which a plaintiff in replevin claims, was not probated until after the bringing of the suit, is no objection to its admission in evidence. *Barnard v. Bateman*, 414.

4. ———. A will proved before the clerk in vacation and recorded, but the probate of which the probate court has failed to confirm, is not admissible in evidence. *Ib.*

5. PROCEEDINGS TO CONTEST A WILL: WEIGHT OF EVIDENCE. The proceeding under the statute to contest the validity of a will being a proceeding at law, this court will not go into the question of the weight of evidence. *Appleby v. Brock*, 314.

6. ———: EVIDENCE OF TESTAMENTARY CAPACITY: PRACTICE. Where non-expert witnesses gave their opinions as to the capacity of a testator to make a will, without objection and without being required to state the ground of their opinions; *Held*, that the fact that they were not shown to have had any correct understanding of the true criterion of testamentary capacity, constituted no objection to a finding and judgment based upon their testimony. *Ib.*

7. ———: ———: NON-EXPERT WITNESSES. The opinions of non-expert witnesses as to testamentary capacity must not be founded upon the testimony of other witnesses, nor upon hearsay or a hypothetical case, but upon their own observation. *Ib.*

8. ———: ———: PRESUMPTION IN FAVOR OF ACTION OF TRIAL COURT. In a proceeding to contest a will tried by the court below without a jury, the weight of evidence (according to the record) appeared to be in favor of the testamentary capacity of the deceased, according to the standard established by this court, but the court below having found that the testator had not testamentary capacity; *Held*, that in the absence of any declarations of law showing what rule was adopted by that court in determining the question, it would be presumed that it adopted the true rule. *Ib.*

9. POWER BY WILL TO CONVEY. A will was as follows: "I will and bequeath to my wife all my real estate, to do with as she shall wish for her own use while she continues my widow. I will that she shall sell one lot," (describing it) "and apply the proceeds to her

own use." As to the lot described, *Held*, (without deciding what estate the widow took in it,) that the power of sale vested in her carried with it the power to convey the fee. *Boyer v. Allen*, 498.

10. THE CONVEYANCE in fee of a specific tract of land for a valuable consideration by a widow to whom her husband's will gave the power so to convey, *Held*, effectual to pass the fee, although it contained no reference to the will or the power; and although the will gave her the use of all the testator's real estate during widowhood. *Ib.*

WITNESS.

1. CRIMINAL LAW: DEFENDANT AS A WITNESS. If the defendant in a criminal case testifies in his own behalf, his relation to the case may be considered by the jury as affecting his credibility. *The State v. Sanders*, 35.

2. WITNESSES before an arbitrator must be sworn. *Wolfe v. Hyatt*, 156.

3. FOR the purpose of impeaching a witness it is competent to inquire as to his general moral character. *The State v. Grant*, 236.

4. UNDER the present statute a defendant in a criminal case testifying in his own behalf, can be cross examined only as to those matters referred to by him in his examination in chief. *The State v. McLaughlin*, 320; *The State v. Turner*, 350.

6. CROSS-EXAMINATION OF THE ACCUSED. When the defendant, in a criminal case, testifies in his own behalf, the jury, in weighing his testimony, have a right to take into consideration his interest in the result. *The State v. McGinnis*, 326.

6. INFORMATION ACQUIRED BY PHYSICIANS AND SURGEONS, PRIVILEGED, WHAT. Section 4019, Revised Statutes, declares that a physician or surgeon shall be incompetent to testify "concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient, or do any act for him as a surgeon." *Held*, that the word "information," as here used, includes not only communications made by the patient, but knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity. All such he is forbidden to disclose. *Gartside v. The Connecticut Mutual Life Insurance Company*, 446.

7. IMPEACHMENT OF DEFENDANT. When the defendant in a criminal case has been examined as a witness in his own behalf, it is competent for the State to introduce the record of his former conviction for another offense for the purpose of affecting his credibility. *The State v. Kelsoe*, 505.

8. WITNESS: DILIGENCE IN PROCURING HIS ATTENDANCE: NEW TRIAL. A party relying upon the promise of a witness to attend and testify, failed to have him subpœnaed. He was present about the time the case was called for trial, but afterward absented himself and a subpœna then issued could not be served because he could not be found. *Held*, that no diligence had been exercised to procure his attendance, and his absence was no ground for a new trial. *Roach v. Colbern*, 653.

HUSBAND CANNOT BE A WITNESS FOR HIS WIFE. Wood v. Broadley, 23.